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ABSTRACT

This module (part of a series of 24 modules) is on the relevance of Public Law 94-142 to education, the history and intent of the law, and the law's specific provisions. The genesis of these materials is in the 10 "clusters of capabilities," outlined in the paper, "A Common Body of Practice for Teachers: The Challenge of Public Law 94-142 to Teacher Education." These clusters form the proposed core of professional knowledge needed by teachers in the future. The module is to be used by teacher educators to reexamine and enhance their current practice in preparing classroom teachers to work competently and comfortably with children who have a wide range of individual needs. The module includes objectives, scales for assessing the degree to which the identified knowledge and practices are prevalent in an existing teacher education program, and self-assessment test items. Topics discussed in this module include relevance of educational legislation, requirements of educational legislation, and free appropriate public education. A bibliography and four articles are included on expanding the rationale and knowledge base pertaining to Public Law 94-142. (JD)

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## Extending the Challenge:

## Working Toward a Common Body of Practice for Teachers

Concerned educators have always wrestled with issues of excellence and professional development. It is argued, in the paper "A Common Body of Practice for Teachers: The Challenge of Public Law 94-142 to Teacher Education,"* that the Education for All Handicapped Children Act of 1975 provides the necessary impetus for a concerted reexamination of teacher education. Further, it is argued that this reexamination should enhance the process of establishing a body of knowledge common to the members of the teaching profession. The paper continues, then, by outlining clusters of capabilities that may be included in the common body of knowledge. These clusters of capabilities provide the basis for the following materials.

The materials are oriented toward assessment and development. First, the various components, rating scales, self-assessments, sets of objectives, and respective rationale and knowledge bases are designed to enable teacher educators to assess current practice relative to the knowledge, skills, and commitments outlined in the aforementioned paper. The assessment is conducted not necessarily to determine the worthiness of a program or practice, but rather to reexamine current practice in order to articulate essential common elements of teacher education. In effect then, the "challenge" paper and the ensuing materials incite further discussion regarding a common body of practice for teachers.

Second and closely aligned to assessment is the development perspective offered by these materials. The assessment process allows the user to view current practice on a developmental continuum. Therefore, desired or more appropriate practice is readily identifiable. On another, perhaps more important dimension, the "challenge" paper and these materials focus discussion on preservice teacher education. In making decisions regarding a common body of practice it is essential that specific knowledge, skill and commitment be acquired at the preservice level. It is essential that other additional specific knowledge, skill, and commitment be acquired as a teacher is inducted into the profession and matures with years of experience. Differentiating among these levels of professional development is paramount. These materials can be used in forums in which focused discussion will explicate better the necessary elements of preservice teacher education. This explication will then allow more productive discourse on the necessary capabilities of beginning teachers and the necessary capabilities of experienced teachers.

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*Published by the American Association of Colleges for Teacher Education, Washington, DC, 1980 ($5.50).

In brief, this work is an effort to capitalize on the creative ferment of the teaching profession in striving toward excellence and professional development. The work is to be viewed as evolutionary and formative. Contributions from our colleagues are heartily welcomed.

This paper presents one module in a series of resource materials which are designed _for use by teacher educators_. The genesis of these materials is in the ten "clusters of capabilities," outlined in the paper, "A Common Body of Practice for Teachers: The Challenge of Public Law 94-142 to Teacher Education," which form the proposed core of professional knowledge needed by professional teachers who will practice in the world of tomorrow. The resource materials are to be used by teacher educators to reexamine and enhance their current practice in preparing classroom teachers to work competently and comfortably with children who have a wide range of individual needs. Each module provides further elaboration of a specified "cluster of capabilities" - in this case, the social principles and values guiding the education of handicapped children and youth.

# SOCIAL PRINCIPLES AND VALUES IN THE EDUCATION OF HANDICAPPED CHILDREN

This module has a single purpose--to instruct about special education policy and the relevance of that policy to educators. It is worthwhile to say a few words about the module, its themes, its relevance to an earlier module, and its organization.

This module has several themes. First, it tries to make special education law, as reflected principally in P.L. 94-142, Education for All Handicapped Children Act (1975), clear. Thus, it discusses the federal law by focusing on the reasons for the law in light of a history of federal concern about handicapped people. It then describes the law and some of the court decisions that led to the law.

A second theme is the relevance of special education law to all of public education and higher education. To demonstrate the relevance, the module explains why higher educators and future teachers need to know about the law. It also argues that many of the requirements of special education law are likely to be useful to nonhandicapped children.

A final theme is the basis of special education law. The basis is fundamentally value-laden and reflects bottom-line constitutional and ethical beliefs. The costs of establishing a legal framework for these beliefs is treated briefly.

An earlier module (Turnbull, Leonard, & Turnbull, 1980) discussed special education and federal law. Like that one, this module covers the major provisions of P.L. 94-142. Unlike it, however, this module does not discuss the judicial decisions, lays greater emphasis on the requirements of P.L. 94-142 and less on the non-educationally related aspects of Section 504 of the Rehabilitation Act, and discusses in detail the conceptual framework of special education law and its principled and value-based foundations. The earlier module serves as a useful precursor to this one.

This module begins with a brief description about special education law's relevance to education. It then introduces the concept of free appropriate public education--the federal history, the discrimination that federal law seeks to overcome, and the provisions of federal law. It also discusses the concepts and principles that undergird the law and it concludes by revisiting the issue of its relevance to education.

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Within this module are the following components: Page

Set of Objectives. The objectives focus on the teacher educator rather than on a student (preservice teacher). The objectives identify what can be expected as a result of working through the materials. The objectives which apply to teachers are also identified. They are statements about skills, knowledge and attitudes which should be part of the "common body of practice" of all teachers. 1

Rating Scales. Scales are included by which a teacher educator could, in a cursory way, assess the degree to which the knowledge and practices identified in this module are prevalent in the existing teacher-training program. The rating scales also provide a catalyst for further thinking in each area. 3

Self-Assessment. Specific test items were developed to determine a user's working knowledge of the major concepts and principles in each subtopic. The self-assessment may be used as a pre-assessment to determine whether one would find it worthwhile to go through the module, or as a self-check after the materials have been worked through. The self-assessment items also can serve as examples of mastery test questions for students. 4

Rationale and Knowledge Base. The brief statement summarizes the knowledge base and empirical support for the selected topics on curriculum assessment and modification. The more salient concepts and strategies are reviewed. A few activities and

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questions have been integrated with the rationale and knowledge base. Particular topics discussed in this section include 9

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Articles. Four brief articles (reproduced with permission) accompany the aforementioned components. The articles support the rationale and knowledge base. 48

# Objectives for Teacher Educators

# and for

# Incorporation into Teacher Education Curriculum

## Objectives for the Module

Upon completion of this module, the reader should be able:

1. To explain the relevance of special education related law to all teachers and teacher educators.
2. To explain the federal government's history of concern for handicapped citizens.
3. To identify the ways in which schools have historically discriminated against handicapped children and youth.
4. To define, under federal law, who is a handicapped child.
5. To explain major differences and similarities between Sec. 504 of the Rehabilitation Act of 1973 and P. L. 94-142 (the Education of All Handicapped Children Act of 1975).
6. To explain the six major principles of law related to the education of handicapped children.
7. To identify the basic constitutional principles that support federal statutes providing for the education of handicapped children.
8. To discuss legislative efforts to make equal educational opportunities available to handicapped children.
9. To develop a typology of "equality," e.g., equal treatment, different treatment, and unequal treatment--and relate it to the dictates of laws related to the education of handicapped children.

## Reasonable Objectives for Teacher Education

Upon completion of a teacher education program, teachers should be able to:

1. Explain the major social principles and values that are represented in legislation and judicial decisions related to the education of handicapped children.

2. Describe the history of educational discrimination against handicapped students and the specific ways that legislation and judicial decisions related to the education of handicapped children have attempted to remediate this discrimination.

3. Develop, explain and justify a personal set of beliefs regarding one's own role and responsibility regarding the education of children with special needs.

# Rating Scale for Teacher Preparation Program

____ 1. Students receive no background in the laws or judicial decisions related to the education of handicapped students.

____ 2. Students are introduced to the laws and judicial decisions related to the education of handicapped students, but are not led to explore the basic social principles and values that these represent.

____ 3. Students have explored the interrelationship of the requirements of laws and judicial decisions related to educating handicapped students and the history of social and educational discrimination against persons with handicaps; they understand the social principles and values that are represented in the current legal requirements regarding handicapped children and youth.

____ 4. Students have a sound background in the historical, social and legal bases for current requirements of educating handicapped students; they understand the social principles and values underlying the formal requirements of law and have also been assisted in developing a set of personal principles and values to guide their own actions as teachers.

____ 5. Students have a sound background in the historical, social and legal bases for current requirements of educating handicapped students; they understand the social principles and values underlying the formal requirements, have had first-hand experiences teaching and interacting with special needs students, and have been guided in using this knowledge and experience to develop personal principles, values and commitments to govern their own teaching.

## SELF ASSESSMENT

1. Can P.L. 94-142 be viewed as a possible forerunner for the structure of education for other children? Why?

2. Before P.L. 94-142 was enacted, public schools believed they were within their rights to limit enrollment to those students who they thought they were best equipped to educate or who would benefit most from their educational services. Handicapped children did not fall within these categories. What two techniques were most utilized to limit the enrollment in the public school system?

3. "Pure" exclusion results when (check all applicable)
    ____ a. a child is denied any education
    ____ b. a child is provided with an education that does not take into account his/her handicapping conditions
    ____ c. a child is denied access to a regular education program
    ____ d. parents disagree with the placement options and enroll their child in a separate educational facility
    ____ e. a handicapped child is placed in a regular classroom with no additional provisions made for his/her handicap.

4. Functional exclusion occurs when
    ____ a. a child is not provided with an education that will allow him/her to function as independently as possible in the environment
    ____ b. a child is denied any access to a public school program
    ____ c. a child is provided with an inappropriate educational program
    ____ d. a child is denied access to an appropriate regular education program

5. A child is denied the right to an equal educational opportunity as a result of misclassification because he/she is
    ____ a. restricted from attending regular education classes.
    ____ b. labeled in such a way that the label will limit his/her progress
    ____ c. barred from schooling that will benefit him/her.
    ____ d. discriminated against on the grounds of race.
    ____ e. denied admission to special education programs.

6. The practice of meritocracy within an educational system results in:
    ____ a. all children having access to an appropriate education
    ____ b. the direction of most of the educational resources to those who can advance the most
    ____ c. the education of those who can benefit society the most
    ____ d. all children having an access to a public education

7. The two major federal laws safeguarding the educational rights of handicapped children and youth are ______________________________.

8. The language of Sec. 504 provides that no recipient of ___________ funds shall discriminate against an otherwise qualified handicapped person solely on the grounds of his/her handicap.

9. The major similarity between Sec. 504 and P.L. 94-142 is in the provisions prohibiting
____ a. the use of funds for handicapped children
____ b. the education of handicapped and nonhandicapped children together
____ c. the exclusion of and discrimination against handicapped children
____ d. the discretionary use of funds for handicapped children

10. The principle of Zero Reject assures handicapped children of
____ a. appropriate assessment procedures
____ b. appropriate placement in public education
____ c. inclusion in federally funded educational programs
____ d. parental participation in placement decisions

11. The principle of Zero Reject applies to
____ a. public schools
____ b. public and private schools
____ c. any other public agency providing education to handicapped children

12. Check which of the following apply to the principle of Nondiscriminatory Evaluation.
____ a. take into account all areas related to the child's disability
____ b. may be administered by only one person, and need not be administered by more than one person
____ c. may be administered in the language common to the neighborhood or community in which the child lives even if the child is atypical of his community
____ d. must include aptitude and achievement test scores
____ e. reevaluate the child when necessary
____ f. be administered by a multidisciplinary team

13. The principle of least restrictive environment guarantees
____ a. placement in the regular classroom
____ b. placement in an integrated school
____ c. placement in a special school with contacts with the regular school
____ d. the most normal setting practicable, given the nature and extent of the child's handicap and needs.

14. Placement of an orthopedically handicapped child in a school for children with other types of handicaps because it is the most architecturally accessible facility is a violation of the principle of
____ a. zero reject
____ b. individualized educational plan
____ c. nondiscriminatory evaluation
____ d. least restrictive environment

15. Check the components of procedural due process
____ a. the right to a hearing
____ b. notification
____ c. access to records
____ d. the ability to cross-examine witnesses

16. The principle of parental participation recognizes
____ a. the need of the child to be evaluated and educated in the home
____ b. the parents as the primary educators of their child
____ c. the need for parents to be brought into the decisionmaking process when determining the IEP
____ d. the responsibility of parent groups in the passage of P.L. 94-142

17. The doctrine of equal protection, the guarantee that no state may deny to any person within its jurisdiction equal protection of the laws, is a ________ constitutional guarantee.
____ a. state
____ b. federal
____ c. moral

18. Which of the following was not provided for in the landmark case of Brown vs. Board of Education?
____ a. where the state has taken to provide an education, it is a right which must be made available to all on equal terms
____ b. the importance of education in our society
____ c. the need for education in order to perform our basic duties as citizens
____ d. the ruling that handicapped children have the same right to education as nonhandicapped children

19. The representatives of handicapped children, relying on in Brown, seek the remedy that
____ a. those handicapped children who can contribute to the good of society as a result of education be provided with an education
____ b. all handicapped children be treated equally
____ c. all handicapped children be provided with an education
____ d. all handicapped and nonhandicapped children who can benefit be provided with a public education

20. Procedural due process is the right of the individual to protest actions which the government takes
____ a. against him
____ b. on his behalf
____ c. in regards to other persons

21. The constitutional foundation for due proces stems from the __________ and _________ Amendments, stating that no person shall be deprived of __________, ___________, or __________ without due process.

22. Three basic procedural safeguards were provided through PARC and Mills. The first of these, notice, entails which of the following?
    ____ a. notified in writing
    ____ b. notified in most common mode of communication
    ____ c. notified in native language
    ____ d. the action the school has taken
    ____ e. the reasons for the action
    ____ f. date of the conference to discuss the actions that have been taken
    ____ g. alternative choices available
    ____ h. right to object to the actions

23. The second of the three basic procedural safeguards is the right to a(n)
    ____ a. impartial evaluation
    ____ b. a hearing before an impartial person
    ____ c. counsel
    ____ d. written summary of the findings

24. The third of the basic procedural safeguards states that the hearing must be ________________________________.

25. Check those items that are due process procedures.
    ____ a. representation by counsel
    ____ b. prompt hearing
    ____ c. present evidence and testimony
    ____ d. convenient hearing location
    ____ e. examine records prior to hearing
    ____ f. receive transcript and written statement of findings
    ____ g. evaluation by jury of peers
    ____ h. results of due process hearing evaluated periodically

26. Current legislation not only attempts to remedy longstanding discrimination by providing for treatment equal to that of nonhandicapped persons but also tries to remedy past wrongs by granting __________ on account of a person's handicap.

27. What does "competing equities" mean?
    ____ a. some people are more equal than others
    ____ b. nonhandicapped people may have to be inconvenienced to benefit the handicapped
    ____ c. handicapped people may have to be inconvenienced to benefit the nonhandicapped
    ____ d. rights of different groups are given equal weight

28. Providing all children with an appropriate education through an IEP is an example of
    ____ a. equal treatment
    ____ b. equal treatment plus
    ____ c. different treatment

29. Providing related services is an example of
    ____ a. equal treatment
    ____ b. equal treatment plus
    ____ c. different treatment

30. Give three examples of how P.L. 94-142 puts our values and beliefs into action by developing our resources: ______________________; ______________________; and ________________________.

31. Give three examples of how P.L. 94-142 puts our values and beliefs into action by allocating status to people: ______________________; ______________________; and ______________________________.

32. Give two examples of the "prices paid" for P.L. 94-142: ______________________; and ______________________________.

## Topical Outline

Law Related to the Education of Handicapped Children

Introduction to Free Appropriate Public Education

- Legislative Preludes
- School practices
    - Exclusion
    - Classification
- Reasons for school practices
- Federal response

Requirements of Special Education Law

- Who is a handicapped child?
- Differences between P.L. 94-142 and Section 504
- The six principles
    - Zero Reject
    - Nondiscriminatory Evaluation
    - Appropriate Education
    - Least Restrictive Environment
    - Procedural Due Process
    - Parent Participation

Concepts and Principles

- Basic concepts
    - Equal protection
    - Due process
- Legislative concepts: "Equality" Operationalized
- Special education principles and values
- The price of principles

Conclusion

## Relevance of Laws Related to the Education of Handicapped Children

Why do teacher educators need to know about laws governing the education of handicapped children? Because all education practices and, therefore, training are affected by these laws in several important ways.

1. Children with disabilities are being served in public and private schools and institutional settings such as penal institutions and state psychiatric hospitals or mental retardation centers. The types and extent of severity of handicaps that children present mean that many, especially those with mild or moderate handicaps, will be served by both regular and special educators. It also means that some, especially those with severe handicaps, will be receiving their education in atypical schools such as education programs operated by corrections and human resources and by persons outside the field of education.

2. Knowledge of special education law is basic to what all teacher educators will be teaching because the education practices that regular education and special education practitioners will use--and thus the higher education sector must teach--are no longer limited to special education only. This is so because all schools and institutions are obliged by law to give all handicapped children, wherever they are, an appropriate education at public expense.

3. Knowledge of special education law is basic to the role that the teacher must fulfill. Whether regular or special educators, the students will have to know about special education law and principles. This is so because they must carry out the law.

4. The law places demands on public and private schools for teachers with good preservice and inservice training. In turn, the law makes demands on higher education to provide these capable professionals. Higher education

is a training ground that produces teachers needed by the schools. The question is not only of the relevance of higher education to primary, elementary, and secondary education, but also of the accountability of higher education to future teachers and to schools.

5. Finally, special education law and principles may point the way to other reform in education, such as to the appropriate and individualized education of gifted children and youth, "slow learners," and nonhandicapped children and youth. This is so because the law enacts good educational practices. As noted by Tom Gilhool (1976) several years ago, "Thus special education may become general and general education, special. We are approaching the day when for each child, handicapped or not, the law will require that the schooling fit the child, his needs, his capacities, and his wishes; not that the child fit the school. That, I believe, is the purport of the so-called special education cases" (p. 13).

## Introduction to Free Appropriate Education

### Legislative Preludes

The earliest federal role in special education--creating special schools for mentally ill, blind, and deaf children during the years between the 1820s and the 1870s--paralleled a similar movement at the state level, in which state schools for handicapped children were established as early as 1823. No further significant federal activity occurred until World Wars I and II spurred the government into vocational rehabilitation programs and aid for disabled veterans and other handicapped persons. Since then, public assistance programs have evidenced increasing federal concern for handicapped citizens. The application of Social Security Act to blind, disabled, aged, and dependent people, the grant of benefits to them under Medicare and Medicaid programs, the payment of Supplementary Security Income, and a host of programs under Title XX of the Social Security Act also testify to the federal government's concerns with the habilitation and training of handicapped people.

The Elementary and Secondary Education Act Amendments of 1966 and 1970, the Vocational Education Amendment of 1968, the Economic Opportunities Act of 1972 (Headstart), the Education of the Handicapped Act of 1971, P.L. 93-380 (which was enacted in 1974 and provided funds for the education of handicapped students under Title VI-B) and P.L. 94-142, the Education for All Handicapped Children Act, enacted in 1975, were the logical results of federal concern about handicapped children's education. The Rehabilitation Act of 1973, the Higher Education Amendments of 1972, and the Developmental Disabilities Assistance and Bill of Rights Act of 1974 also contributed to the political feasibility of P.L. 94-142.

## School Practices that Prompted Legal Reform of Special Education

As a general rule, the nation's public schools were highly ingenious and very successful in denying educational opportunities, equal or otherwise, to handicapped children. As reported in Sec. 602 (b) of P.L. 94-142, Congress found that approximately one-half of the nation's eight million handicapped children were not receiving an appropriate education and about one million received no education at all. The multitude of exclusionary practices the courts found violating the educational rights of the handicapped were also proof of the problem. Among those practices, two were predominate: exclusion and classification.

Exclusion. Exclusion occurred when a child was denied an education by being denied access to all public educational programs or being provided with an education inadequate for his needs. Total exclusion involved schools' refusing to admit the child or placing him on a long waiting list. Exclusion also occurred (and still occurs) when programs were inadequate or unresponsive to students' needs, as when Spanish-speaking children are given an English curriculum and no special provision is made to accommodate the fact that they do not understand English or when moderately retarded children are put in large regular classes and given little or no training or education. Such practices constituted "functional exclusion"; although the child had access to a program, the program was of such a nature that he could not substantially profit from it and therefore received a few or none of the intended benefits of education.

The schools excluded school-aged handicapped persons individually and as a class. They admitted some but not all students with the same disability. When appropriate programs were not available, they placed handicapped pupils in special education programs that were inappropriate for them. When faced with a shortage of special education programs, they created waiting lists for admission to the few available programs, thus excluding many eligible pupils. They also created different admission policies for the handicapped. Finally, they limited the number of students who could be enrolled in special education programs by using incidence projections that bore little relation to the actual number of the handicapped in the school district or by restricting state-level funding for hiring of special education teachers by establishing artificial quotas, such as one state-paid teacher for every twelve pupils in each special education class.

Classification. Classification was and still is at issue when schools misplace or wrongly track students. Misclassification denies a child his right to an equal educational opportunity because it results in his being denied schooling that will benefit him.

Challenges to school placement criteria are often accusations of racial discrimination as much as they are complaints about denial of an education. The objection is that the tests used to classify children are biased toward knowledge of the English language and familiarity with white middle-class culture. Accordingly, test scores can cause minority children to be placed in special education programs in far greater numbers than other children; the result is dual systems of education based on race or cultural background.

Once a child was placed in a special education program, his placement often became permanent because reconsideration of placement or reevaluation of the child was out of the ordinary. The assignment usually was carried out without parental participation and without opportunities for parents to challenge the schools' actions. Frequently, schools failed to identify the handicapped children in their districts: child census procedures were rare, and the school's target population often was neither known, planned for, nor served. Early intervention programs for handicapped children were the exception, not the rule. Placement in private programs was encouraged because it relieved schools of any responsibility for serving children whose families were able or desperate enough to pay for private school opportunities.

## Reasons for School Practices

There are many reasons why schools followed these practices. Not only was the cost of educating or training a handicapped child normally higher than the cost of educating the nonhandicapped child, but manpower, money, and political clout for handicapped children were limited when compared with the same resources for nonhandicapped children. And despite state statutes requiring schools to educate handicapped children, local noncompliance with state law requiring schools to educate handicapped children rarely was punished.

To many educators, handicapped pupils, particularly mentally retarded ones, did not appear to be educable in the traditional sense; the time-honored "reading-writing-arithmetic" philosophy was a reason for exclusion. The fact that special education was separated from the mainstream of regular education, coupled with the desire of both special educators and educators in programs for nonhandicapped students to stay separate from each other, also tended to diminish educational opportunities for handicapped individuals. Special education served as an important escape hatch, permitting schools to classify as handicapped those children they considered undesirable--the racial minorities, the disruptive, and the different. Behind this practice (indeed, underlying all of the discrimination) was the widely held attitude that governmental benefits, including education, should be parcelled out to the most meritorious. It is a belief that equates merit with average intelligence or nonhandicapping conditions and asserts that less able children are less worthy.

### Federal Response

The enactment of P.L. 94-142 (to assist states in carrying out self-imposed obligations) and of Sec. 504 (to prohibit discrimination in federally assisted public school programs) was the federal government's way of responding to school practices that violated the federal constitution, state constitution and laws, and good educational practices for handicapped individuals. The federal response is the content of the remainder of this manual.

## Requirements of Laws Related to the Education of Handicapped Children

### Who is a Handicapped Child under P.L. 94-142 and Sec. 504?

P.L. 94-142. For the purposes of P.L. 94-142, handicapped children are those who are mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically or otherwise health impaired, or who have specific learning disabilities (cf. the module by Jack Birch in this series for specific definitions).

Section 504. Under Sec. 504 of the Rehabilitation Act of 1973, prohibiting discrimination against an otherwise qualified handicapped individual, the term "handicapped person" means any person who has a physical or mental impairment that substantially limits one or more "major life activities," has a record of such an impairment, or is regarded as having such an impairment. "Physical or mental impairment" means (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculo-skeletal; special sense organs; respiratory (including speech) organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endoctrine; or (2) any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness (including addiction to alcohol or drugs), and specific learning disabilities.

"Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

"Has a record of such an impairment" means the person has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.

"Is regarded as having an impairment" means the person has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.

"Is regarded as having an impairment" means the person (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by a recipient of federal funds as constituting such a limitation, (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment, or (3) has none of the impairments listed above but is treated by a recipient of federal funds as having such an impairment.

With respect to public preschool, elementary, secondary, or adult educational services conducted by public schools other than universities, a "qualified handicapped person" is someone who is (1) of an age at which nonhandicapped persons are provided such services, (2) of any age at which it is mandatory under state law to provide services to handicapped persons, or (3) guaranteed a free appropriate public education under the terms of P.L. 94-142.

Differences Between P.L. 94-142 and Sec. 504. The language of Sec. 504 provides that no recipient of federal funds shall discriminate against an otherwise qualified handicapped person solely on account of his handicap, and the regulations for implementing this law make it clear that Sec. 504 applies to preschool, elementary, and secondary public education programs that receive any federal assistance from HEW (Subpart D, Regulations, Fed Reg, May 4, 1977, pp. 22676-94). They also make it clear that the schools must not exclude any handicapped child; must provide a free, suitable education to each handicapped person who is a legal resident of the recipient's jurisdiction, regardless of the nature or severity of his handicap;

conduct nondiscriminatory testing; must place handicapped children in the least restrictive environment; and must guarantee due process for handicapped children. Thus, Sec. 504 and its implementing regulations accomplish largely the same results as P.L. 94-142 with respect to prohibiting exclusion and discrimination against handicapped children.

Despite a similarity to P.L. 94-142, Sec. 504 and its regulations differ from P.L. 94-142 in several important respects:

1. Sec. 504 includes as handicapped those persons who are so defined by P.L. 94-142, but it also includes many others, such as persons addicted to the use of drugs and alcohol. The two laws also take different approaches to the issue of who is handicapped. P.L. 94-142 basically relies on a categorical approach and anticipates the continuation of categorical labelling of children: "mentally retarded," "learning disabled," etc. Sec. 504 relies on both a categorical approach and an entirely different approach, best described as "functional." Under that approach, a child is handicapped if he functions as though he were handicapped or if a state or local government receiving federal funds responds to him as if he were handicapped: there is an impairment in his major life activities, he has a record of an impairment, or he is treated as having an impairment. Although Sec. 504 generally applies to handicapped persons without respect to their age, age is at issue when the person is a handicapped person of school-eligible age because the regulations define a handicapped student as one who, under state law or P.L. 94-142, is entitled to a public education (ages 3-21 under P.L. 94-142).

2. Sec. 504 prohibits discrimination in preschool, elementary secondary, and adult public education, in the employment of the handicapped, in social and health services, and in higher education. By contrast, P.L. 94-142 financially assists schools only in preschool, elementary, secondary,

and adult education. Both laws, however, speak to the problems of architectural barriers and access to facilities.

3. Sec. 504 does not require individualized educational programs for handicapped children; P.L. 94-142 does. Both require appropriate education.

## The Six Principles of P.L. 94-142 and Section 504

Zero Reject. Both P.L. 94-142 and Sec. 504 assure handicapped children that they may not be excluded from federally funded school programs. Among other things, these statutes (1) require schools to plan to serve all handicapped children, adopt policies that serve all handicapped children, and conduct searches to locate all handicapped children; (2) apply not only to public schools but also to other public agencies that provide education to handicapped children (e.g., mental health, human resources, corrections, and youth training agencies) and to private schools into whose programs handicapped children are placed by public schools; (3) require schools to give handicapped children an appropriate education; (4) place responsibility on a single state agency for assuring that all state and local agencies comply with these acts; and (5) forbid architectural barriers in school facilities.

Nondiscriminatory Evaluation. Congress has taken into account the fact that a school's failure to detect a child's handicaps or to assess him adequately can result in his being denied an appropriate education. Accordingly, it has required that procedures for classifying children be selected and administered so as not to discriminate on the basis of race or culture, that no single procedure may be the sole criterion for placement decisions, and that tests generally must be administered in the child's native language or method of communication.

Tests must be validated for the specific purpose for which they are used; be administered by trained personnel in conformance with the producer's instructions; be designed to assess specific areas of educational need (not just intelligence quotients); be administered so as not to discriminate on account of a child's impaired sensory, manual, or speaking skills; be administered by a multidisciplinary evaluation team; and take into account all areas related to the child's disability, including health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities, where appropriate. Schools also must draw on information from aptitude and achievement tests and teacher recommendations and take into account the child's social and cultural background and adaptive behavior; document the sources of this information and carefully consider it; reevaluate a child every three years or more often if conditions warrant; and not count as handicapped (for purposes of receiving money under P.L. 94-142) more than 12% of all the children in a district.

Appropriate Education. The principal method for furnishing an appropriate education to a handicapped child is the Individualized Education Program (IEP). The IEP is a statement developed by a group of persons, including a child's parents and the child himself when appropriate, to identify the child's present levels of educational performance, short- and long-term objectives for him, and the special and regular educational services he is to receive, when he should receive them, and for how long.

The IEP is not the only method for determining what constitutes an appropriate education. A second method looks to the process for dealing with a handicapped child. Is he provided with a free (publicly paid for) education? Has he been fairly evaluated? Is he in the least restrictive placement appropriate to him? Has he been assured of due process safeguards? Have his parents been given full opportunities to participate in decisions affecting his education?

A third method is suggested by the Section 504 regulations. They require a school to provide a child with special education and related aids and services designed to meet his educational needs as adequately as the needs of nonhandicapped children are met. This special education must be based on the least restrictive placement principle, consist of preplacement evaluation and nondiscriminatory testing, provide an annual reevaluation of the student's special education placement, and assure him of procedural safeguards.

Least Restrictive Placement. Having found that handicapped children have been inappropriately educated, denied the opportunity to be educated with their peers, and not given adequate services in the school, Congress requires schools to develop procedures to assure that, to the maximum extent appropriate, a handicapped child will be educated with nonhandicapped children and will not be removed from regular education programs and placed in special classes, separate schools, or other spearate educational activities unless the nature or severity of his handicap is such that his education in regular classes, with the use of supplementary aids and services, cannot be achieved satisfactorily.

These regulations make it clear that: "appropriate" is determined by the child's needs and IEP; placement usually should be in the same school the child would attend if he were not handicapped; if his placement with nonhandicapped children in the regular classroom significantly impairs their education, the placement is not appropriate for the handicapped child; a handicapped child should be given a chance to participate in nonacademic and extracurricular services and activities; a child placed in a private school retains his rights to placement in the least restrictive setting; the burden is on the school to justify the child's placement outside regular programs, including nonacademic programs and services; schools that are identifiable as being for handicapped students must be comparable to the school district's other facilities, services, and activities; a handicapped child ordinarily should be placed as close to his home as possible; and an orthopedically handicapped child may not be placed in a classroom or school that is "primarily" for other handicapped children (such a placement violates not only the least restrictive placement rules but is unnecessary if the school district complies with the requirements to remove architectural barriers).

Procedural Due Process. The procedural (due process) safeguards of P.L. 94-142 and Section 504 include: parent access to school records; independent educational evaluations; appointment of surrogate parents if a child's parents are unknown or unavailable or he is a ward of the state; prior notice to parents before a school proposes or refuses to initiate or change the child's identification, evaluation, placement, or provision of a free appropriate public education; and parental or school opportunity for a hearing before an impartial hearing officer, including the right to be assisted by counsel and expert witnesses, present evidence, cross-examine witnesses, subpoena witnesses, make oral or written argument, receive a copy of the officer's decision, and appeal.

Parent Participation. Parent participation in educational decision-making is a basic tenet of P.L. 94-142. Parents are involved in the meeting held to develop the IEP release of the child's education records. Parents also must have the opportunity to participate at public hearings conducted by the state education agency. The purpose of these hearings is to review the state's annual program plan prior to its adoption and submission to the federal government. The copy of the plan must include a summary of comments received at the hearing and a description of modifications made in the plan as a result of the comments.

State agencies also are required to establish a state advisory panel on the education of handicapped children and to appoint at least one parent of a handicapped child as a member of this panel. The responsibilities of this panel involve both the development of policy and the monitoring of its implementation.

Parental participation also is secured through insuring that parents have full access to their child's educational records. This includes the opportunity to review any or all of the school records on their child, have an explanation or interpretation of the records, have their representatives review the records, or request that the records be amended because of inaccuracies or violations of privacy. The only exception to parental access to records is cases in which the agency has been advised that the parent does not have authority under state law pertaining to matters such as guardianship, separation, and divorce. Parents must also be brought into the decision-making process regarding the release of personally identifiable information on their child. This refers to the release of information for any purpose, including research.

## Concepts and Principles

### Basic Concepts

The provisions of P.L. 94-142, Section 504, and the regulations implementing them are based on important constitutional principles.

Equal Protection. "Equal protection of the laws" is such a simple phrase, but it is by no means as simple to understand and apply as one might think. The Fourteenth Amendment to the federal constitution provides that no state may deny to any person within its jurisdiction the equal protection of the laws. As interpreted by the courts, the amendment has produced a remarkable series of judicial results which effectively prevent government from denying governmental benefits to persons because of their unalterable and uncontrollable characteristics (such as economic status, place of birth, religion, age, sex, race, or handicap) and in many cases require affirmative measures to redress the unequal treatment those people have experienced at the government's hand. Inequalities have existed in the opportunity to be educated and handicapped children have been among the victims of educational discrimination. The Fourteenth Amendment has become the vehicle for redressing that inequality.

The recent judicial attacks on the many exclusionary practices of the schools focus on the importance of education, its protected status under Brown vs. Board of Education, and its claim to favored treatment under the Fourteenth Amendment. Brown stressed the importance of education in terms that have been quoted or cited with approval in nearly every subsequent related case. "The importance of education to our democratic society" and the relationship of education to "the performance of our most basic public responsibilities" were the grounds on whi[illegible] the Court reached the conclusion that the opportunity of an education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Representatives of handicapped students, relying on Brown, have claimed that handicapped children have the same rights to education as nonhandicapped children. Their complaint has two major elements. First, they complain that there is a differential treatment among and within the class of handicapped children--that is, some handicapped children are furnished education while others are not. They seek the remedy that all excluded handicapped children be given an education. Second, they complain that some handicapped children are not furnished an education while nonhandicapped children are. They seek the remedy that all children, including handicapped children, be included in the public education systems.

The basic argument of Brown was that the equal protection doctrine protected a "class" of persons--in that instance, a racial minority. In applying the equal protection doctrine, the courts have asked whether a state's action in distributing benefits and burdens (such as educating some but not others) was based on a "classification" of persons with apparently equal characteristics, and whether that classification resulted in some "members" of the "class" being treated less equally than others. For example, in the school desegregation cases the "class" to be protected was all students, whether white or black. When a state treated black students differently by requiring them to attend segregated schools, the courts found that black students had been denied equal protection of the school laws on the basis of an unalterable and uncontrollable trait--their race.

In the right-to-education cases, the "class" is all students, whether handicapped or not. A state undertakes to provide a free public education system for its school-age citizens; when the state treats handicapped students differently by denying them an opportunity to attend school or by inappropriately assigning them to special education programs, the courts found that the handicapped had been denied equal protection of the school laws on the basis of their unalterable and unchosen trait--their handicap.

Although Brown established the right to an equal educational opportunity based upon Fourteenth Amendment grounds, it was not until PARC v. Commonwealth and Mills v. D.C. Board of Education that Brown became meaningful for the handicapped. In both PARC and Mills the courts relied on legal and educational authorities to support their finding that education was essential to enable a child to function in society and that all children can benefit from education, and they applied the equal-protection guarantees of the Fourteenth Amendment to furnish this important right to all handicapped students.

Due Process. The essence of due process is fairness--the right of a citizen to protest before a government takes action with respect to him. In the case of the handicapped child, that means having the right to protest actions of the state education agency (SEA) or the local education agency (LEA). For those who pioneered the right-to-education doctrine, the procedures for implementing the right were as crucial as the right itself. Without a means of challenging the multitude of discriminatory practices that the schools had habitually followed, the children would have found that their right to be included in an educational program and to be treated nondiscriminatorily (to receive a free appropriate education) would have a hollow ring. Procedural due process--the right and means to protest--is a necessary educational ingredient in every phase of the handicapped child's education.

It also was seen as a constitutional requisite under the requirements of the Fifth and Fourteenth Amendments that no person shall be deprived of life, liberty, or property without due process of law. In terms of the education of handicapped children, this means that no handicapped child can be deprived of an education (the means for acquiring property, "life," and "liberty" in the sense of self development) without having a right to protest what happens to him.

The success of the right-to-education law suits reaffirmed a belief widely held by lawyers--namely, that fair procedures will tend to produce acceptable, correct, and fair results. This is apparent upon examination of the elements of due process in special education.

A person who is adversely affected by the action or inaction of a SEA or LEA is helpless to protect himself from the agency or to protest the decision unless he has adequate prior notice of what the agency proposes to do and for what reasons and an opportunity to have a hearing to challenge the action. The notion of prior notice clearly applies when a handicapped child is actually involved with an agency; when he has applied for admission to a program; has been placed or refused placement; has or has not been identified as handicapped; or has or has not been evaluated as handicapped. All of these actions can occur only after the child comes to the school's attention.

However, many handicapped children have been totally excluded from the schools, and often parents (or guardians) have been unaware of their child's right to an education. In the earliest right-to-education cases, PARC and Mills, an initial issue for due process consideration was parental ignorance of a child's right to an education. In response, PARC and Mills ordered local school boards to engage in extensive child find efforts.

After the handicapped children were located, schools were required to evaluate them and place them in appropriate educational programs. The requirements for placing a child or changing his placement include three components. The first is notice to the child's parent or guardian in writing. There are special provisions, not specified in the orders, for parents who cannot read English or who cannot read at all. The notice must describe the action the school proposes to take, the reasons for it (including references to the results of any tests or reports on which the action is based), and available alternative educational opportunities. The right to a hearing prior to educational evaluation or placement includes the right to a conference before the school evaluates or places a child. It is logical for a conference to precede formal notice of proposed action or inaction because the development of a child's individualized education program in the requisite conference also becomes, at the least, the basis for the child's placement. Notice also must be given prior to reassignment since both the initial placement and any subsequent placement affects the child's right to an appropriate education. The notice must inform the parent of the reasons for the proposed action and of his right to object to the proposed action, to receive a hearing on his objection, and to obtain free medical, psychological and education evaluations.

One of the purposes of written notice is to give actual notice--to inform the parent of the proposed action--and it is doubtful that actual notice can be conveyed without a detailed explanation of what the school proposed to do and why. A statement of proposed action is meaningless unless the action is fairly described in detail and the reasons for the action are fully described. The formality of notification is constitutionally insufficient; it is the reality of the notice--the details of proposed action and the reasons therefor--that is constitutionally required.

Second, if a parent requests a hearing, it must be conducted by a hearing officer independent of the local school authorities, at a time and place convenient to the parent. The hearing must be held within a specific period after the parent requests it, and is generally closed to the public unless the parent requests otherwise.

Procedural due process not only allows a potentially adversely affected person to protest proposed governmental action; it also furnishes him with a forum where he can present his objections and have them heard and ruled on by a disinterested party. The parent is not just entitled to a hearing; he has a meaningful right to have the hearing before an impartial tribunal and at a time and place convenient to him. Justice delayed is justice denied, and the right to a reasonably prompt hearing is a prerequisite to any procedural safeguard. And because the hearing may involve evidence that divulges highly personal aspects of a child's or his family's life (e.g., whether he is emotionally disturbed or why he is physically disabled), the notion of a right to privacy permits hearings to be closed to the public unless the parent does not object to open hearings.

Third, the hearing must be conducted according to due process procedures. The parent must be informed that he has the right to be represented at the hearing by counsel, to present evidence and testimony, to confront and cross-examine witnesses, to examine school records before the hearing, to be furnished with a transcript of the hearing if he wishes to appeal the decision of the hearing officer, and to receive a written statement of the findings of fact and conclusions of law.

The right to present evidence and examine and cross-examine witnesses is the foundation of the right to be heard. Moreover, the right to call expert witnesses speaks directly to the issue that is often the very reason for the hearing--namely, the evaluation and placement of the handicapped child. Access to school records is part and parcel of the right to examine and cross-examine witnesses.

The right to appeal, to a record of the hearing, and to a statement of the hearing officer's decisions and reasons are indispensable in assuring a parent that arbitrariness will not govern the hearing and its results; that is, the hearing will have both the appearance and the reality of fairness.

Another important requirement from the cases is that student assignments must be reevaluated periodically. PARC required automatic biennial reevaluation of any educational assignment other than to regular class; annual reevaluation was available at the request of the child's parent. Prior to each reevaluation, there was to be full notice and opportunity for a due process hearing. Mills also required periodic reevaluation of the child's status. Without mandatory periodic reevaluation and notice thereof to the child's parent, the opportunity for protest (i.e., the opportunity for due process) might be lost, since it is unlikely that schools would encourage parents to exercise their due process rights. Some parents, having been put off by their first hearing--not having achieved a decision they wanted, or having "learned" not to challenge the professionals--would not continue to assert their child's rights without the enforced reevaluation.

In the past, some disciplinary procedures were misused to exclude handicapped children from the public school. Subsequent court decisions have prohibited the application of those procedures in such a way as to exclude handicapped children from education. _Mills_ directly addressed the problem of misused disciplinary procedures by setting out in detail the procedural safeguards to be used in any disciplinary proceeding. _Mills_ required that the District of Columbia schools "shall not suspend a child from the public schools for disciplinary reasons for any period in excess of two days without affording him a hearing pursuant to the (due process) provision ...and without providing for his education during the period of any such suspension." The provisions for notice and hearing in disciplinary cases were much like those that apply to placement, transfer, or exclusion. The essential elements were notice to the parent of the action to be taken, the reasons for it, and the procedural rights of the parent, including the right to an independent evaluation and to examine the school records.

It is not surprising that the case-law requirements of due process are reflected, almost in perfect mirror image, in the applicable federal statutes.

## _Legislative Concepts: "Equality" Operationalized_

More than constitutional guarantees are at work in forming the basic concepts that undergird governmental responses to discrimination in education based on handicap. "Normalization" (the idea that the lives of handicapped people should be made as nearly "normal" as practicable) and the constitutional principles just discussed justify legislation that prohibits governments and recipients of governmental money from discriminating against disabled people solely because of their handicaps, that grants rights and entitlements in lieu of privileges, and that distributes benefits to and reduces burdens on handicapped people.

The recent recognition by a large number of lawmakers that handicapped citizens have been systematically denied opportunities for more adequate and even full citizenship and have suffered grievious and long-standing discrimination exclusively because of their handicaps has evoked an effort not merely to treat them as the equal of nondisabled persons to the maximum extent feasible but also to remedy past wrongs by granting present benefits on account of a person's handicap. Such an effort cannot be made without taking into account two important doctrines. One, couched in terms of equal opportunity, recognizes that differential treatment of disabled people may be necessary in order to provide them with opportunities that are roughly equal to those enjoyed by nonhandicapped people. The other, characterized as a competing equities issue, acknowledges that to some extent the nonhandicapped person must be inconvenienced in order to benefit the handicapped person. Both of these doctrines come into play when legislatures reform educational practices by, first, chipping away at and eventually dismantling entirely some of the restrictions that government and social mores place on disabled people, and, second, enlarging the rights, privileges, and entitlements that government and society grant such citizens.

Laws that dismantled restrictions--such as those that sanctioned the discriminatory practices described above--were necessary but not sufficient. They assured the removal of negatives, of laws that condoned discrimination; in so doing, however, they created a vacuum, a void in which no affirmative rights existed to benefit disabled children. That is why it was necessary to create rights, to take positive action to fill the void. Thus, P.L. 94-142 not only forbids pure and functional exclusion, but also grants affirmative rights--to a fair evaluation, an individualized appropriate education in an enhancing setting procedural safeguards, and parent participation.

To establish the rights of handicapped children to a free appropriate education, it has been necessary to use three separate techniques of law reform. Good illustrations of these techniques are available in special education law.

The first technique is to extend to handicapped people the same rights as are available to nonhandicapped people. This technique reflects a pure "equal treatment" ideology: handicapped and nonhandicapped people should be treated exactly alike in the eyes of the law. The rule of equal treatment is reflected in some of the major principles of P.L. 94-142. The principle of zero reject (no handicapped child should be excluded from a free appropriate public education on account of his handicap, however severe it may be and whatever its nature) is an equal treatment technique because it requires the schools to educate both handicapped and nonhandicapped students.

The second technique is to make available to handicapped people the same rights as available to nonhandicapped people but to do so only after making modest adaptations in those rights so that the handicapped person can effectively take advantage of the rights. The adaptations take into account that the handicapped person may not be able to take full advantage of exactly equal treatment because of his handicap. This technique requires incremental deviation from pure equal treatment. It reflects equal treatment "plus" adaptations. A good example of this technique in P.L. 94-142 is the "appropriate education" requirement IEPs reflected in (individualized educational programs) and related services (the IEP may also illustrate the third technique of law reform, but it will be used here as an illustration of the second.) The IEP is the linchpin of an appropriate education; it defines who will be providing what kind of services to a handicapped child and the manner in which he will be educated appropriately. Unlike nonhandicapped children, who generally do not have a right to an IEP and for whom public schools are assumed to be appropriate, handicapped children must have an IEP (an incremental deviation from the same treatment given to nonhandicapped children) because public schools cannot be assumed to be appropriate for them; instead, they must be made appropriate. Likewise, handicapped children have the right to "related services" (such as physical and occupational therapy, social work services, psychological services, medical evaluation, and speech therapy, and audiological services) if necessary for them to benefit from special education (specially designed instruction). The right to related services rests on the assumption that public school education, even special education, may not be effective unless accompanied by other services. The contrary assumption with nonhandicapped children is that public school education will be appropriate and they therefore do not need any additional services ("related services").

The final technique is to enact legislation that takes into account the fact that a handicapped person may not be able to benefit fully from adaptations in programs because of the nature or extent of his handicap.

Legislation of this type makes available to handicapped people special and substantially different opportunities or rights than available to nonhandicapped people. In special education law, the requirement of "nondiscriminatory evaluation" (to determine the nature and extent of a child's handicap) and "procedural due process" (the right to a hearing if schools do not satisfy a handicapped child's other rights) illustrate this technique. Nonhandicapped children are not given nondiscriminatory evaluations because it is assumed that they do not need to be assessed carefully; they have no handicaps and thus no special characteristics that require special education. Also, nonhandicapped children do not have the same due process rights as handicapped children because it is assumed that their rights--to be included in school, to a fair evaluation, to an appropriate education, and to placement in beneficial programs--will not be as often jeopardized as handicapped childrens'.

To repeat, the basic concept underlying the second and third techniques is really quite simple: Exactly equal treatment may not be sufficient to make rights truly available to handicapped people or to prevent schools from discriminating against them on account of their handicaps. That being the case, different or special treatment may be necessary to assure handicapped people an equal educational opportunity.

## Principles and Values Relating to Educating Handicapped Children

The merger of basic social and constitutional principles and values, and ideally experiences with people who have special needs, makes it possible for educators to develop a personal creed regarding education of handicapped children and youth. It would be beneficial to all teacher educators and teacher education students, once familiar with the ideas presented in this module and in the appended readings, to write down and be prepared to defend their own personal beliefs ("creed") about educating handicapped children. The authors of this module have done so and share theirs with the reader as an example of one set of principles and values about the education of handicapped children and youth.

> We believe that education makes a difference in a person's life. That was one of the foundations of Brown v. Board of Education and is supported by the six principles of P.L. 94-142.
>
> We know and believe that handicapped children can profit from an education appropriate to their capacities; hence, P.L. 94-142 and the case law grant each handicapped child a right to a suitable education. In the case of P.L. 94-142, an affirmative duty to hire handicapped people is also imposed on the public schools.
>
> We also believe in equity; that is, in equal educational opportunity. Thus P.L. 94-142 and the cases grant the right of education to all handicapped students.
>
> We believe in the value of an education for all people--the universality of education. Accordingly, P.L. 94-142 and case law grant the right to an education to all handicapped students.
>
> Most of us believe that governmental benefits should not be parcelled out on the basis of unalterable characteristics of the recipients. We believe that such a practice says something demeaning and invidious about the person who is denied benefits, and it places the government in the position of causing that person to feel and act inferior simply because he is different from those who are receiving the benefits. Our acceptance of this belief is seen in racial discrimination cases and in both criminal and civil law where a person is denied benefits because he is indigent, an alien, a member of one sex or the other, or handicapped. In the case of the handicapped, the right-to-education cases and P.L. 94-142 challenge the old distribution of governmental benefits (education) and attempt to redistribute them more equitably. They attack a system of distribution founded on the false premise that the handicapped are expendable and that the bulk of benefits in education should be given to the most meritorious (where merit was measured by intelligence or conformity to the nonhandicapped norm).

> We believe in the essential sameness of all persons. Grounded in concepts of normalization, egalitarianism, and equal protection this belief leads us to assert that the handicapped student is no less worthy of constitutional protection and statutory benefits than a nonhandicapped student. Although people may be classified, their rights to an education should not be denied because of classification. The principle of free appropriate public education for all handicapped children illustrates this belief.
>
> We also believe that the economic investment of furnishing a handicapped person with an education appropriate to his needs will yield long-term returns in the increased productivity and decreased dependency of that person. On humanitarian grounds we also point out that handicapped students have been seriously shortchanged in the competition for governmental benefits. Each principle of the right-to-education movement attests to this belief.
>
> We believe that the ample evidence of longstanding state and local neglect of the eductional claims of handicapped children will not be abated in the foreseeable future. We even believe that it will be permanent. For that reason, permanent federal funding and control is amply justified.
>
> We believe that, because we choose who governs us, we hae the right to ask our representatives to be accountable to us. To that end, P.L. 94-142 and the case law require several types of accountability.
>
> We believe that people should treat each other fairly and decently and that government should deal fairly and decently with the governed. Alternatively stated, we believe that a fair process of governing will produce fair and acceptable results. Thus, P.L. 94-142 and the case law requiring that procedural safeguards be made available to handicapped students and their parents.
>
> We believe that the best government is one we can influence or affect. We believe in participatory democracy in the education of children, and P.L. 94-142 can well be the high-water make of participatory democracy in public education.
>
> P.L. 94-142 translates our believes into public policy for the education of handicapped children, assigns legal rights that reflect our collective decency, and defines and refines our relationships to each other and among the government and the governed.

More often than not, our beliefs harmonize with our values. In this respect, and particularly in the right-to-education movement, the word "value" has a similar meaning.

A value is something we, as individuals and as a society, highly prize and cherish; it is something we do not want to be without and we do not want others to be without. In a constitutional sense, a value is a "fundamental interest." There are many such values, and the right-to-education movement reflects at least four of them.

One, we do not want to be without access to courts or other forums for the peaceful solution of our differences with others. Expressed in another way, we do not want to be without a way of being heard and heeded when we have disagreements with others. Access to the courts as an avenue for redress of grievance is constitutionally required and is provided in P.L. 94-142 and in the right-to-education cases through requirements for procedural due process.

Two, we do not want to be denied a right to participate in self-government. Thus, the right to vote is constitutionally protected and the right to participate in school (as a "government") is provided in P.L. 94-142 and the case law under the concept of parental participation.

Three, we do not want to be without the opportunity to acquire property or fulfill ourselves. The principles of substantive due process guarantee us these opportunities as a matter of constitutional law, and P.L. 94-142 and the case law address them through the requirements of nondiscriminatory evaluation (protection from classifications that inevitably forestall or retard the opportunities of handicapped children to develop to their maximum potential) and least-restrictive appropriate placement (protection from programs that will have equally debilitating results).

Four, we do not want our unalterable traits, such as race, sex, ancestry, or place of birth, to be used as a basis for government distribution of burdens. Thus, P.L. 94-142 and the case law provide for appropriate public educational opportunities for handicapped students.

It is remarkable to see how effectively P.L. 94-142 puts our beliefs and values to work for the education of handicapped children. The act shows how we develop our resources to allow our beliefs and values to flourish. This function is performed by the requirements for IEPs, parent involvement, and the child census.

P.L. 94-142 also shows how we allocate status to people as a reflection of our values and beliefs. We allocate power to handicapped children through such provisions as permanent funding of P.L. 94-142, zero-reject principles, and least-restrictive placement requirements. We distribute power to their parents through participation in IEP conferences, procedural safeguards, membership on advisory panels, and participation in developing state and local plans. Finally, we allocate status to educators by legitimatizing the truly special functions of special education and by changing the roles of educators with respect to each other (through the principle of least-restrictive placement).

P.L. 94-142 changes not only the status or power of people involved in the right-to-education movement, but also the procedures by which power and status are allocated. That is the ultimate meaning of the procedural safeguards and parent participation provisions.

P.L. 94-142 changes more than the procedures; it changes the very rights that government distributes, the beneficiaries of those rights, and the methods of distributing them. It guarantees a free appropriate public education to all handicapped children, changes the nature of their education so that it will be appropriate to them, prefers some handicapped children over others (the service priorities), grants rights to parents of handicapped children, and demonstrates that federal funds are a means of enforcing those rights (by funding the excess costs of educating handicapping children, requiring the pass-through of funds, setting limits on administrative costs that may be charged against Part B funds, and making federal funding permanent).

## The Price of Principles

P.L. 94-142 and the case law thus perfectly illustrate the unique role of law and lawmakers in changing existing institutions of society and building new ones. But the price has been dear and P.L. 94-142 and the case laws are not without their detractors. We have paid in the redistribution of governmental power over the education of handicapped children; the balance of power now clearly rests with the federal government and the principles and values of local autonomy in education have been diminished. We have legislated a change in the competition for equities and weighted the law in favor of handicapped children by requiring state and local educational agencies to make their own investments in the education of those children (by way of the excess-cost formula).

The "first generation" issues--whether all handicapped children have a right to an appropriate education at public expense--are fading fast and will soon be replaced by "second generation" issues dealing with the specifics of the right to a free appropriate public education. As advocates for handicapped children select their ammunition to advance the claims of handicapped children in second-generation matters, they must be on their guard as to the forums they choose for their battlegrounds and the issues around which battle is joined. This is so because they would not want to add fuel to the fires of reaction against handicapped children; such a reaction might cause our underlying beliefs and values to be denied by those in the majority (the nonhandicapped), people whose very beliefs, values, and attitudes are so crucial to the success of the law and the acceptance of handicapped children.

Advocates for handicapped children have articulated the beliefs and values that are the foundations for P.L. 94-142 and the case law. Will they be willing and able to say that the educational rights of handicapped children should be made available to nonhandicapped children as well? Can they continue to arouse the sympathetic imagination of nonhandicapped people so that their claims to better educational opportunities will be supported by and give support to the claims of handicapped children?

## Additional Instructional Activities

There are many materials and activities that may be beneficially used to introduce the concepts outlined in this module to preservice teachers. Group activities are especially useful in challenging students to thoughtfully explore their own values, the values inherent in our Constitution and laws and in relating these values to the role of the teacher. Groups may be provided with materials such as those appended at the end of this module to stimulate general discussion or may be provided with specific focused tasks. Scores of activities that relate to the contents of this module are easily thought of; the following are a few examples.

1. Provide students with a list of or have them locate articles, newstories, books and laws that reflect on past and present treatment of handicapped people. Have them outline the "condition" of handicapped people in our society and then design a specific "Bill of Rights" for handicapped people that would help guarantee them basic rights known to non-handicapped people.
2. Have students examine the minimum standards for the education of handicapped students and outline ways that schools and classrooms could be reorganized to afford the same general protections to handicapped students with the minimum amount of differentiation between handicapped and non-handicapped students.
3. Have students research and evaluate the assumptions in Sec. 601 of Public Law 94-142 (appended) and criticize the appropriateness of various requirements of the law in light of the findings.
4. Have students comment on the observation by Sarason and Doris (among the appended readings) that,

   > One of the clearest implications of Public Law 94-142 is that the gulf between the special and regular education has to be bridged, and yet the law requires no change in our college and university training centers.

   Have students outline the skills they see as required by the law, those for which specific training is needed and those they feel they could manage simply by knowing about them.

## CONCLUSION

Zero reject and protection from functional exclusion, individualized appropriate education, nondiscriminatory and nonstigmatizing classification procedures and placement, rights to procedural safeguards, and the rights of participation are six principles that are supported by widely and deeply held beliefs and values in our society. But more than that, they have a touch of justice, and no child, handicapped or nonhandicapped, deserves more or less justice. This is why knowledge of the laws relating to educating handicapped students, and an understanding of the principles underlying those laws, is so important to all educators. It is value laden in the deepest sense of the word.

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# APPENDIX A

## Key to Self Assessment

1. Innovations in education, such as individualized educational plans required by P.L. 94-142, can be applicable to and beneficial for non-handicapped and/or gifted students. P.L. 94-142, then, enacts good educational practices.

2. exclusion and classification

3. a (in b and e the student is being excluded from an appropriate education. This results in functional rather than pure exclusion.)

4. a, c, and d (In b the student is experiencing "pure" exclusion.)

5. b and c (Indicating e may also be correct. Misclassification can lead to a handicapped student not being identified and therefore being denied access to a special class. Indicating a may also be correct. A mildly handicapped student identified as moderately or severely handicapped is less likely to be admitted, even part time, to a regular education class.)

6. b, c

7. P.L. 94-142 and Sec. 504 of the Rehabilitation Act

8. federal (This does not mean that if an agency does not receive federal funds it has the option of discriminating against handicapped people. Alternate safeguards against discrimination often are provided through state laws.)

9. c

10. b and c (No student legally may be denied an appropriate public education.)

11. a, b, and c

12. a, f (The indication of c did not note the "trick" quality of this answer. The test must be given in the child's own language or mode of communication. Aptitude and achievement scores may be included, but are not always required, given the situation of a severely handicapped individual for whom these scores tend to be meaningless. The indication of d could or could not be correct depending on the student you are dealing with. An indication of e fails to note that a reevaluation needs to occur at least every three years, or more often if conditions warrant. "When necessary" may never occur with some students in some schools.)

13. d (The indication of a, b, and c denotes the hierarchy of placements possible. The law, however, does not guarantee placement in these settings, only that these settings must be reviewed when the placement decisions are being made. It does require these placements when they are available and appropriate.)

14. d (A restrictive environment not only deals with the physical qualities of the setting, but also with the type of students the child is likely to encounter. A child must be placed in the most normal setting practicable. Educational and social considerations should take precedence over mobility considerations.)

15. a, b, c, d

16. c

17. b

18. d (Brown vs. Board did not deal with the question of handicapped students.)

19. c

20. a and b (Indicating only a does not recognize that many of the government's actions are done with the intent of benefitting citizens.)

21. 5th, 14th, life, property

22. a, b, c, e, g, h (The indication of d fails to notice the past tense of the verb. The school cannot take action without first notifying the parent. The indication of f is incorrect for this same reason.)

23. b

24. conducted according to due process procedures.

25. a, b, c, d, e, f

26. benefits, rights, or entitlements

27. b

28. b

29. b (An indication of c also may be correct. The treatment is different in that nonhandicapped students do not receive these additional services as a matter of federal law.)

30. IEP, parent participation, child census.

31. Permanent funding, zero-reject; least restrictive placement; IEP; parent participation; procedural safeguards

32. Redistribution of governmental power; change in competing equities.

From: M. C. Reynolds (Ed.). Foundations of teacher
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# ALL THE CHILDREN OF ALL THE PEOPLE:

## PUBLIC LAW 94-142 AND AMERICA'S PROPOSITION FOR EDUCATION

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ABSTRACT:-When fully implemented, Public Law 94-142, which mandates equal educational opportunity for handicapped children and youth, will do much to eliminate classroom segregation of the disabled. This desegregation (mainstreaming) is bound to produce the kinds of creative encounters that, if combined with sensitive guidance and committed teaching will result in acceptance, camaraderie, and levels of awareness virtually unachievable by adults of the present generation. In this context, Public Law 94-142 is, perhaps, this nation's most rigorous trial in its quest to square principle with practice and to establish true equality of educational opportunity.

### THE HANDICAPPED PERSON IN AMERICA

Handicapped persons in America find themselves surrounded by constant, persistent, and comprehensive reminders that their lives are anything but normal.

A visually impaired adolescent finds that her peers are unaware that sometimes she does not perceive their facial expressions, nods, and gestures. Worse still, those persons who are aware often are unwilling to provide her with the few audible clues she needs for adequate discourse.

A paraplegic finds himself in a world of buildings, sidewalks, and motor vehicles that are engineered to ignore his basic needs. His physical environ-

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ment imposes ridiculous restraints on him and makes outrageous demands.

Hard-of-hearing persons are reproached frequently for "hearing only what they want to hear." The implication is that they are guilty of deliberately and willfully provoking the people who want to talk with them. Their accusers find it difficult to understand that in some situations they can discriminate sounds and in other situations, they cannot. It seldom occurs to hearing persons that such factors as room noises, distance from the source of speech, room acoustics, and competing sounds all make significant differences to hard-of-hearing persons.

Scarcely anywhere in the United States can a handicapped person enter a store, restaurant, movie theater, or hotel without wondering uneasily whether he will be stared at and what those stares signify.

In employment, a handicapped person suffers severe discrimination. If he finds a job, it is usually menial or second-rate and at a lower salary than that paid to a nonhandicapped person. Statistics on the employment of handicapped people of working age are grim: Only half the paraplegics in this country have jobs; fewer than one-third of the blind have jobs; and even fewer persons with cerebral palsy have jobs. The situation of handicapped Vietnam war veterans is appalling: The rate of employment for them is a mere 13.3% whereas for nonhandicapped Vietnam war veterans the rate is 91%.

Transportation, particularly public facilities, is very difficult for handicapped people. Frequently, they are denied access to public conveyances. For example, one airline is reported not to permit a blind person to sit beside a person of the opposite sex; another company refuses to accept epileptics as passangers; and still other airlines refuse to transport mentally ill persons while others refuse to provide certain services customary to such persons. Many other airlines require that a fare-paying attendant accompany a handicapped passenger in a wheelchair, although the passenger is able to attend to his own needs.

What I have described is a pattern of exclusion that is persistent, systemic, and institutionalized. This pattern developed over many years, and generation after generation acquiesced in it. Even the most enlightened among us never exhibited conflicts of conscience over society's duty to handicapped individuals. Their conditions were thought to be tragic misfortunes dealt by fate, and scarcely anything constructive was demanded by public duty except for sympathy. For the most part, we did this very well.

When a family and members' lives were disrupted by the presence of a handicapped child or adult, we urged toleration. If our moral conscience was aroused, we expressed sympathy. And when our sense of public duty was challenged, we made donations of money. But we always managed to keep our distance: We tolerated, sympathized, and donated from a distance. It was one thing to be benevolent, to be charitable toward the "less fortunate," but exceedingly difficult to be "close," to acknowledge that on a continuum of human capabilities, the discrete categories of handicap and intact are unreliable. There was comfort in the perpetuation of the "we"/"they" dichotomy (Sumner, 1906). The culture shock of fundamental kinship with handicapped individuals has been almost more than we have cared to face.

Now, distances have narrowed. With the enactment of Public Law 94-142, large numbers of Americans have had to come to grips with the presence of several million handicapped children and youth in the nation's schools. The law reforms a host of presuppositions about education for all. Resulting from the vision and diligence of parents of exceptional children and educators, it insures every child who has a handicap equal opportunities for an education. To the maximum feasible extent, the law guarantees an appropriate education in the "least restrictive environment," along with children who have no handicaps, for all handicapped children.

Distances have narrowed as never before. For the first time, children and their parents and teachers are required to accept the presence of handicapped children in their midst and to try to integrate them into all school activities, curricular and extracurricular. More important, the law prohibits sidestepping issues affecting the education of the handicapped population.

The issue is one of justice, simple justice. Compassion, empathy, and goodwill toward handicapped persons are not central anymore, however personally redemptive these traits may be. Providing least restrictive educational environments is primary. This objective is tangible, measurable, and mandated by the Act. Opponents of the law, the really serious ones, can only hope to inspire a revolution of their own.

## THE AMERICAN PROPOSITION AND EQUAL EDUCATIONAL OPPORTUNITY

When it was founded, America offered the world a bright new ray of hope and a new proposition for freedom. All could come who wanted to: the poor, the rich, the dispossessed, the disenchanted, all who would leave behind old notions of birthright and adopt new ideals of initiative and achievement as measures of social standing. Many people came, leaving old homelands of denial and founding new homesteads of personal freedom and higher possibilities.

In framing the documents that set forth the ideals upon which the United States were founded, a rare coalition of gifted men worked together for long periods and on several different occasions to construct the Declaration of Independence, the Constitution of the United States, and the Bill of Rights. Seldom before or since have men of such extraordinary intellect cooperated so effectively on such a monumental endeavor. The resulting documents heralded a new episode in world history and offered greater freedoms to larger numbers

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of people than previously had been afforded by any other country. Yet the ideals set forth by these founding fathers never applied to all Americans. The promise and dream were exclusive. It soon became apparent that they never were meant to apply to the increasing number of Americans whose race, creed, gender, or physical disability were deemed to prohibit their participation in this great new hope for freedom and opportunity.

The glaring facts of injustice and discrimination are a matter of record. Oppressed groups were always what the esteemed sociologist Dan W. Dodson termed, "a footnote to the dream." Because of this exclusion, a cleavage appeared between the American dream and reality, a cleavage that emphasizes the great incongruence between principle and practice, between the ideal and the practice, a cleavage that is still manifest today in various and sundry forms of discrimination and prejudice.

Nowhere is the cleavage between dream and reality any clearer than in the area of education. (Nor is any institution better situated to effect change.) Here, the promise of the American plan was clear and the mandate concise. Education was to be the "great equalizer." Through education every person would be entitled, at least in principle, to realize his or her potential, not merely to repeat the biases of the environment but to change the environment to the benefit of all.

The great transformation of individuals was to take place in schools They were to prepare students to live in a "free" society by enabling them to actualize their potentials, irrespective of circumstance or condition. Schools were to discover, augment, and validate the talent and ability of students without respect for race, creed, or physical disability. Obviously, this great plan was never realized. The American proposition was a bold, new adventure that was always uneasy with individuals or groups who were "different."

Public Law 94-142, in providing for disabled children to be educated in least restrictive environments with their nonhandicapped peers, represents the most recent and, clearly, the most important test of the resolve with which the nation continues to adhere to the principles that were established initially with fervor and commitment.

Among a series of philosophical, political, and legislative efforts to square principle with practice, Public Law 94-142 possibly presents the most rigorous test of the American proposition for education. The law evokes the highest national ideals in our quest to establish sensible yet just provisions for equal educational opportunity. If it survives ever-present opposition and, thus, worthwhile goals are achieved for disabled as well as nondisabled children, by implication, the validity of the American proposition itself will be redeemed and there will be reason for all oppressed groups to renew their faith in the quest for equal educational opportunity under the

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law. If the nation's concept of equal educational opportunity cannot withstand the acid test of Public Law 94-142, the ideal itself is in jeopardy.

## "THE QUIET REVOLUTION"[1]

Handicapped persons in our society have had a long history of outrageous and unequal treatment that has impeded not only their social acceptance as human beings but, also, their chances to function as human beings. Until recently, part of the municipal code of Chicago stated,

> No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view, under penalty of not less than one dollar not more than fifty dollars for each offense. (Chicago Municipal Code)

Denial of equal educational and economic opportunities has been and continues to be, for handicapped persons, a fact of life. Not until we admit this fact will we be able to change our attitudes toward handicapped students and take intelligent action to improve their condition.

Both attitudinal and practical discrimination against handicapped individuals have existed for some time in startling dimension. Although we have no Mount Taygetus[2] in this country on which to exhibit our infirm, the institutions we created to restrain them have been as plentiful as they have been awful. Wolfensberger wrote of eighteenth century America:

> Connecticut's first house of corrections in 1722 was for rogues, vagabonds, the idle, beggars, fortune tellers, diviners, musicians, runaways, drunkards, prostitutes, pilferers, brawlers--and the mentally afflicted. As late as about 1820, the retarded, together with other dependent deviant groups (such as aged paupers, the sick poor, or the mentally distracted) were publicly "sold" ("bid off") to the lowest bidder, i.e., bound over to the person who offered to take responsibility for them for the lowest amount of public support. (Deutsch, 1949)

Even the United States Census of the 1800s classed together "defectives, dependents, and delinquents":

> The chronic insane, the epileptic, the paralytic, the imbecile and idiot of various grades, the moral imbecile, the sexual pervert, the kleptomaniac; many, if not most, of the chronic inebriates; many of the prostitutes, tramps, and minor criminals; many habitual paupers, especially the ignorant and irresponsible mothers of illegitimate children, so common in poor houses; many of the shiftless poor, ever on the verge of pauperism and often stepping over

> into it; some of the blind, some deafmutes, some consumptives. All these classes, in varying degree with others not mentioned, are related as being effects of the one cause--which itself is the summing up of many causes--"degeneracy." (Johnson, 1903, p. 246)

Concurrently, however, there were some attempts to initiate limited education for certain handicapped persons. In 1848, Dr. Samuel Gridley Howe, a New England physician who, years before, had traveled to England to study methods to teach the blind, advocated opening a wing of the Perkins Institution in Boston as an experimental school for "idiotic" children; 10 children were enrolled, and the Massachusetts legislature appropriated $2,500 per annum for operations. Dr. Howe's report to the legislature stated,

> It would be demonstrated that no idiot need be confined or restrained by force; that the young can be trained for industry, order and self-respect; that they can be redeemed from odious and filthy habits, and there is not one of any age who may not be made more of a man and less of a brute by patience and kindness directed by energy and skill. (Kanner, 1964)

A shift in public policy toward the handicapped population in the early decades of the present century lead ultimately to the passage of Section 504, Title V of the Rehabilitation Act of 1973, a significant step toward the passage of Public Law 94-142. This legislation progressed from strictly civil rights and vocational rehabilitation statues to those pertaining to education. The Smith-Fees Act (Public Law 66-236), enacted in 1920, was intended to provide vocational rehabilitation for returning World War I veterans. The Randolph-Sheppard Act (Public Law 74-732), passed in 1936, provided for states to license handicapped persons, usually veterans, to operate concessions on federal property. A most significant shift in policy and public disposition toward handicapped people was evidenced in 1943 with the passage of the Barden-LaFollette Act (Public Law 78-113). Its provisions covered the mentally handicapped, excluded in previous Acts, and made money available for medical treatment, prosthetic devices, and equipment that could facilitate the achievement by handicapped persons of more satisfying lives.

Although the enactment of this legislation reflected shifts in public attitude and policy toward handicapped indivdiuals, it was not until the appeals to the Fourteenth Amendment of the Constitution that fundamental education changes for handicapped children seemed inevitable. The Amendment guarantees equal protection under the law. Specifically, whenever a state undertakes to provide a benefit of any kind to any citizen, it must make that benefit available to all citizens on an equal basis, unless compelling reasons for not doing so can be offered. This guarantee is expressed in Brown vs. Board of Education:

> In these days it is doubtful that any child may reasonable be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it is a right which must be made available to all on equal terms. (p. 686)

Two principal cases set the final stage for the enactment of Public Law 94-142. They occurred early in the 1970s in Pennsylvania and the District of Columbia, respectively.

The first was a class action that was brought against the State of Pennsylvania in the Federal District Court alleging the state's failure to provide retarded children with access to free public education. The suit, commonly known as "PARC" because it was brought by the Pennsylvania Association for Retarded Children, resulted in a consent degree to provide all retarded children with publicly supported appropriate education by September 1972.

A similar decree in the same year ended the case of Mills vs. Board of Education of the District of Columbia. The court determined that all school-age handicapped children were entitled to a free public education regardless of the severity of their handicaps.

Much of the legislation listed in this section reflects shifts in perspectives on the nature of handicapping conditions. Heiny (1971) described three discernable stages:

> From an historical perspective, special education may be viewed as developing through three successive stages: (1) treatment through the segregation and restriction of resources for survival appropriate for people called different, (2) caring for people regarded as different by providing resources required for their physical existence, and (3) instructing such people so that they may be incorporated into existing, dominant social systems. (quoted in Lance, 1976)

Public Law 94-142, which mandates equal educational opportunity for handicapped children and youth, was signed into law on November 29, 1975, following an 83-10 vote of affirmation by the U.S. Senate in June and 375-44 in the House of Representatives in July of that year. Weeks of deliberation disclosed these facts.

> 1. Nearly two million children in this country were being excluded from education solely because of their handicaps.
> 2. Half of the nation's eight million handicapped received less than the appropriate educational services to which they were entitled.
> 3. Many handicapped children were improperly placed because their handicaps were undetected.
>
> (Exceptional Children, 1977)

To many lawmakers who had no previous knowledge of the plight of the handicapped, these facts were startling. From an historical perspective, then, Public

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Law 94-142 is the climax of hard-fought efforts to rectify injustices and prejudices of long standing. Its passage marked the end of a successful, quiet revolution that will be remembered for years to come.

## AND A LITTLE CHILD SHALL LEAD THEM

### Where Do We Go From Here

Since America's inception as a nation, the American proposition to its people and the nations of the world has been that freedom and justice are basic human rights of the first order; that these rights must extend to all persons regardless of birth, material wealth, or personal circumstances; and that the collective resources of the country shall be rallied in support of any initiative to assure every person a fair and equal chance to take advantage of the opportunities such freedom implies. Thomas Wolfe affirmed this ideal in stirring prose:

> To every man his chance; to every man regardless of his birth, his shining golden opportunity; to every man the right to live, to work, to be himself; to become whatever his manhood and decisions combine to make him. That is the promise of America. (quoted in Warner & Slade, 1974)

Almost as dramatic as the ideal is the fact that the promise has not been realized by persons in many quarters of American society. Injustice, inequality, and denial of basic freedoms are a matter of record. Yet the proposition itself was one of process, not product. That is, the plan was not to guarantee the ideal but to assure that the ideal could be sought. In other words, the nation was not to be judged by the fulfillment of its ideals at any one time but by its processes, its searchings, its willingness to change.

Nowhere is the testing of our nation's intent to provide a fair and equal chance to all Americans more pivotal than in education. Equal educational opportunity is an ideal, the full realization of which requires perennial redefinition. Today, this ideal faces what is perhaps its most exacting test: Can equality of educational opportunity be extended successfully to handicapped persons who are placed in regular classrooms? The nation's schools, as in the past, are summoned to provide an answer.

Public Law 94-142 sounds a clarion for the social and educational rights of handicapped children and youth. It seeks to establish for them the same rights to education that already exist for their nonhandicapped peers. Acclaimed as the most significant U.S. legislation since the passage of the 1964 Civil Rights Bill, Public Law 94-142 is, perhaps, the most significant education legislation ever.

### The Crucible of Attitude

The importance of the "quiet revolution" is a matter quite apart from the "rightness" or "wrongness" of Public Law 94-142. Debates about the Act undoubtedly will persist. However, the law is likely to bring into sharp relief the question of whether substantive attitudinal changes, even in the long range, will result from the new structural arrangements mandated by the Act. The warning, "You can't legislate attitudes," when applied to a host of discriminatory practices, is by now a common cliche. The belief is widespread, nevertheless, that once social structural conditions (e.g., specific forms of discrimination) are changed values and attitudes will follow.

The problem that seems likely to benefit most from compliance with Public Law 94-142 is that of societal attitudes toward handicapped people. The concept that facts do little if anything to change attitudes is as common as it is unproven. Certainly, however, no one is ever cured of prejudice without knowing the true facts. Ethel Alpenfels, the anthropologist noted,

> Prejudice is a social problem. Like illiteracy, disease, and poverty, it has causes that we must try to understand if we are to work together to correct its evils. It does not necessarily follow that if we know the facts we shall immediately change our attitudes toward others, but factual information is necessary for any intelligent action. The scientific way of thinking can help to teach the lesson that mankind has never fully understood: namely that many races, many religions, many nationalities can live together in understanding and peace. (Alpenfels, 1946, p. 12)

Facts alone may not change attitudes but they lay the firm foundation for eventual understanding. It is what we do after we know the facts that counts. Facts plus understanding plus a desire to conquer prejudice lead to constructive action. A living, personal commitment to the acceptance of disabled individuals must become a reality. This full acceptance cannot be theoretical; it must be applied and, like any application it must begin with a minority of one. The commitment, ultimately, must be personal.

When classrooms are made more inclusive as a result of Public Law 94-142, inevitably children will acquire perspectives that are different from those of their parents. The very fact that handicapped and nonhandicapped children must share classrooms, playgrounds, art studios, shop rooms, rest rooms, and field trips means that they cannot help but become accustomed to seeing each other and to being together. Indeed, one can look upon the methods that were used to enforce segregation (e.g., separate schools; fire hoses; lynchings; "special" classrooms and schools; and stigmatic labeling) as ways of preventing different peoples and groups from coming together and getting to know each other. Thus, the school experiences of students today are the antithesis of those of their parents and must lead to changes in the way handicapped children are perceived. We are approaching the day when a disability will no longer be a relevant variable in determining educational opportunity, employment, and community participation.

In pondering the outcome of this grand encounter, we can only speculate on how this aspect of twentieth century America will be treated in future history books. Will we be described as a caring, compassionate people of whom some were handicapped--physically, mentally, and emotionally? Will they report that all persons--intact and handicapped--shared this age and place, shared also their challenge to lead productive lives, and joined hands to help to make the world a better place for all? Will history record how our nation, when it finally accepted the opportunity to change long-standing patterns of neglect, error, and prejudice, no longer sought to deny these mistakes but, instead, reached into the stores of its justice, compassion, and humanity to produce the kind of support necessary for handicapped people to assume more productive lives and more equitable participation in our society?

It really boils down to this: Attitudes toward disabled people developed over long periods of time and, like other prejudices, can not be changed over night. It is unlikely that any sudden awakening producing widespread change will occur. What we can do, however, is to work to eliminate institutionalized discrimination against disabled people, irrespective of attitudes. Attitudes will follow, even if decades removed.

Public Law 94-142, when fully implemented, will do much to eliminate the classroom segregation of disabled children and youth. This desegregation will lead to the kinds of creative encounters among children that will result in acceptance, camaraderie, and levels of awareness virtually unachievable by adults of the present generation.

Children take for granted ideas toward which their parents can only grope. Adults possess the heavy burden of "knowledge" and fixed notions about the world and its people, their capabilities, and indeed, their limitations. More often than not, our notions about these limitations are as much the cause of the limitations as they are inaccurate and defeating.

In order to facilitate these changes, we must re-examine our outmoded thinking about *how* change takes place. The idea that each generation must scale precisely the same obstacles and meet and resolve exactly the same issues and difficulties as their forebearers, just is not so. Children are natives in a world to which adults never can belong. What seems difficult to adults may leave children wondering why it was ever a problem in the first place.

Still, adults, especially teachers and parents, have a pivotal role to play in passing along to children the opportunity to form their own judgments and opinions, not merely to repeat the biases of the past. This requires commitment, hard work, planning, and painful breaks with established tradition. In order simply to provide children with a chance to lead the way, adults must have the vision and willingness to work hard at what is surely a noble goal.

## TEXT NOTES

1. The term "Quiet Revolution" is used widely to refer to the events leading to the passage of Public Law 94-142. The earliest use of the term is attributed to Dimond (1973) in an early article on the litigation surrounding the education of handicapped children.
2. The legendary mountain on which the Spartans left their afflicted or defective children.

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## 17

# Mainstreaming: Dilemmas, Opposition, Opportunities

THE SPEED WITH which mainstreaming as a concept, value, and public policy has emerged in our society is little short of amazing. Indeed, the change has come about so fast and with such apparent general approbation as to raise a question about what people understand about mainstreaming and its implications for schools. Let us try to gain some historical perspective on this question in the hope of avoiding an oversimple stance to a very complicated set of issues. Because we may think mainstreaming is desirable is no excuse for assuming that institutional realities will accommodate our hopes. To confuse change with progress is to set the stage for disillusionment.

### Mainstreaming before 1950

Imagine that it is anytime before 1950 and you are attending a convention of people who work in the field of mental retardation. Suppose that at the general meeting someone requests the floor and makes the following statement:

> This is the first time I have attended this kind of meeting and I am impressed and encouraged by what I have heard. Thank God there are people like you who are fighting for justice for mentally retarded people. For too long society has ignored the needs of these people. Our state institutions are, as many of you have said, overcrowded and understaffed: We call them training schools but for the most part they are custodial institutions, and pretty bad even at that. What really gave me a lift was to hear so many of you call for many more community facilities to reduce the need for institutionalization. For example, you favor more special classes in our schools, want to attract more and better people into special education, and in general upgrade training programs in colleges and universities. But one thought has been nagging at me: why do we have to segregate mentally retarded individuals in our schools? Why are we so ready to separate them from the mainstream? Why can't they be accommodated in the regular classroom? Are you in favor of separate but equal facilities in exactly the same way as we treat blacks? Does not this type of segregation affect the retarded person adversely, and does it not rob the normal student of a kind of knowledge and experience that will make the student a better moral person? I would like to go on record as opposed in principle to the segregation of mentally retarded children in our schools. Indeed, I move that we go on record as opposed to segregation anyplace.

The speaker would have been regarded at best as a misguided idealist of the bleeding heart variety, and at worst as a dangerous mentally disordered person, out of touch with social reality and the nature and needs of mentally retarded people. The speaker would have been met by a stony silence and the meeting would have moved on to more "realistic" considerations. It would be an egregious injustice to judge the response as a symptom of callousness, immorality, or narrow self-interest serving the status quo. The fact is that these were dedicated people sincerely trying to get society to be more responsive to what the advanced knowledge, research, and experience suggested about the nature and needs of mentally retarded people. Indeed, the people well understood societal prejudice because they devoted themselves to the welfare of mentally retarded people! Why would anyone "choose" to work with "them"?

Let us do some more imagining. One of the people at the meeting feels badly that no one bothered to respond to the speaker, and feels an obligation to seek the speaker out to explain why his recommendation was so misguided, however lofty the motivation. So, this person gets the speaker aside and says:

> You are an idealist and there is a part of me that accepts what you said about segregation, although in the case of mentally retarded people you are simplifying the complexity of the issues. But let's assume that everyone at this meeting agreed with you. How do you think the "outside world" would react?
>
> I'll tell you how they would react: either with the same stony silence you received at this meeting or with anger because we are telling them that their communities have been immoral, callous, and irresponsible. And how do you think the school people would respond? They don't even want the special classes they now have; so how do you think they would cotton to the idea of putting mentally retarded people into the regular classrooms? Put them into the mainstream? It would be unfair to say they would like them to drown, but it is not unfair to say they want them on isolated islands surrounded by an awful lot of water. Mainstream them? If we came out and said *that*, it would be used as evidence that *we* were mentally retarded.

Twenty-five years later, mainstreaming became public policy. Did opposition melt away? Was there an unprecendented attitudinal and moral change in our society? Were welcome signs erected by schools and communities? Or were we dealing with a variation of the 1954 Supreme Court desegregation decision: racial segregation in schools was unconstitutional but changing practice to accord with that decision turned out to be beset by a host of obstacles, deliberate and otherwise. There were some naive people who greeted that decision with a sigh of relief: thank God the moral cancer was spotted and could now be excised—maybe not tomorrow or next year but certainly in a decade or so. We have learned otherwise. Deeply rooted attitudes, ingrained and reinforced by tradition, and institutional and social structure and practice, are not changed except over a long period of time (Sarason 1973). And mainstreaming is no exception.

Let us examine more clearly what contributed to this change in attitude and policy. The first set of facts represented a convergence of events and forces: the quick growth and power of a national parents' group; the Kennedy family's personal and political interest in mental retardation powered by the financial resources of the Kennedy Foundation; and exposés in the national media of degrading conditions in state institutions that made mental retardation a topic of public interest. But this change is not comprehensible unless one sees it in the context of an even more drastic social change accelerated by the Great Depression: the widespread acceptance of the idea of governmental responsibility for citizens rendered dependent or handicapped for reasons beyond their control (Sarason 1976).

Before the thirties, it was not seen as the federal government's responsibility to intervene in matters of education and health. There were a few handicapping conditions such as blindness for which there were modest programs, but they were the exceptions and not to be considered forerunners of an increased federal role. The philosophy of "that government is best that governs least" made it extremely difficult to sustain national attention on issues in education and health. At best, they could receive attention in the states but even the states were guided by the prevailing philosophy. It took a national economic calamity to start the process of philosophical change, so that today our prepotent response to a social problem is to think in terms of federal policy and programs.

At the time that mental retardation started to receive national attention and the pressures for a federal role began to mount, there were social forces, at first unrelated to policy issues about mental retardation, that later had the most influence on how these issues were to be transformed. We refer here to the civil rights movement, which came from the desire to eradicate racial discrimination but which soon spread far beyond these confines to include the rights of women, homosexuals, older people, members of the armed forces, children. What were their constitutional rights? What constituted their equality before the law, and how had tradition and practice come to rob them of their basic constitutional rights as citizens? On what constitutional grounds can mental patients be confined in a state hospital? What are the legal restrictions to the use of psychological tests as a basis for job promotion? What legal procedures must be observed before a child can be suspended or expelled from school?

One could ask scores of similar questions, all testifying to a resurgence of attention to individual liberties and rights. Put in another way, the law and therefore the courts became agents of social change. The most pervasive changes have been through judicial decisions essentially reinterpreting or enlarging the scope of laws and existing constitutional language. And many of these decisions were not greeted with anything like unanimous approval, involving as they did radical changes in institutional thinking and practice. And that is the point; although these court decisions were stimulated by "plaintiffs" seeking change, they were opposed by "defendants" who were by no means few in number if lacking in strength. To interpret a decision in favor of the plaintiff as a "victory" is understandable but one should never underestimate how long it can take for the spirit of victory to become appropriately manifest in practice.

When mental retardation first became a topic of public discussion, moral-humane rather than legal-constitutional matters were in the forefront. Mentally retarded people "deserved" as much attention and programmatic support as other groups with disabling conditions. In fact, advocates for the mentally retarded wanted no more, and certainly no less, than "separate but equal facilities." No one was calling for elimination of state training schools or special classes. However, it did not take long before the rationale behind the historic 1954 Supreme Court desegregation decision began to influence the thinking of advocates for the mentally retarded.

Central in that rationale was the argument that segregation has pernicious effects both on the segregant and the segregationist. The 1954 decision marked the first time that the Supreme Court had ruled the findings of social science research admissible as evidence, and the weight of that evidence was that segregation had adverse effects on white and black children (Fellman 1969). Generalizing from that rationale, it is not surprising that its judicial relevance to mentally retarded people began to be examined. As a consequence, the status of mentally retarded people became a focus of legal scholars.

Lawyers did not have to be sophisticated about mental retardation to see, study, and write about legal-constitutional issues long ignored by everyone. And once the forces behind the movement for more and better facilities started to go down the legal-constitutional road, their goals became more encompassing and radical – radical in that they found themselves at a familiar root: segregating mentally retarded people in schools or elsewhere was demeaning to all involved. Blatt and Kaplan's (1966) *Christmas in Purgatory* – a pictorial essay of scandalous institutional conditions that was given such a big play in the mass media and placed in the hands of every United States Congressman – told only what happened to those who were segregated. In his subsequent books (*Exodus from Pandemonium*, 1970; *Souls in Extremis*, 1975; *The Revolt of the Idiots;* 1976) Blatt rounded out the picture by telling us what happens to the segregators.

The literature on the impact of court decisions on mentally retarded people in schools, institutions, the community, and work is vast. It is also staggering in complexity of details and the niceties of legal argument to those unfamiliar with constitutional law and the workings of the judiciary. But to someone interested in history and social change it is a fascinating literature. We recommend to the reader *The Mentally Retarded Citizen and the Law* (1976) edited by Kindred, Cohen, Penrod, and Shaffer. This book discusses the major court decisions as well as suggests the major problem areas whose legal-constitutional status has yet to be clarified. Another important and instructive book is *The Right to Education* by Lippman and Goldberg (1973), describing the development and consequences of the landmark Pennsylvania court decision affirming the right of all handicapped children to an education. It is interesting that the authors, who participated in the litigation, saw the case as a variation of 1954 Supreme Court desegregation decision.

## Opposition

We have given this very brief overview in order to make a point too easily overlooked: the change in societal attitude and social policy was spearheaded by a dedicated minority relying on political pressure and the courts; at every step of the way this minority encountered opposition, especially from those in schools, institutions, and state agencies who saw how drastic the proposed changes would be for them. This opposition, of course, is quite understandable. After all, few people look with relish at the necessity of redefining their roles, activities, and values. Those who opposed the proposed changes were not evil or unintelligent people. Far from it. They were people engaged in public service, carrying out their tasks in ways that their professional training as well as long-standing custom said was right and effective. To be told that their values were wrong, that they had been contributing to evil, and that they would have to accommodate to new procedures and practices, it is no wonder that opposition did not dissolve. It may have had an opposite effect.

Consider the structural-administrative relationship of the field of mental retardation to the field of education, beginning with colleges and universities. In our schools of education, mental retardation has always been "special" or "exceptional," in that whatever it was, it was pretty much by itself, away from the mainstream of "real" education. Faculty and students in mental retardation were rarely viewed with a sense of pride, as an indispensable part of a department or school of education. It is not by chance that in our private colleges and universities mental retardation was hardly represented, and most of the time was completely unrepresented. If it was represented in our state colleges and universities, it was less because it was viewed as indispensable and more as a reaction to pressure or legislation for preparing the teachers to take positions in state institutions. Even then, the department of mental retardation or special education tended to be small and politically weak. If these departments were more tolerated than warmly embraced it bespoke of snobbishness reinforced by and reflecting societal attitudes.

The field of mental retardation was seen as an unrewarding one in which to work. The field had a "hopeless" quality and if people entered it, it was either because the could not make it in the mainstream of education, or they were misguided, or they were noble, self-sacrificing individuals.

But there was a more fundamental assumption that undergirded all of these perceptions and it was one that everyone accepted: to understand and educate mentally retarded students required theories and techniques different from those required for "normal" human beings. There is or should be one human psychology based on principles applicable to all people. Women are different from men, Republicans from Democrats, and Catholics from Protestants, but to conclude that these differences arise on the basis of psychological-developmental-social principles and processes unique to each of these groups is gratuitous and a massive misinterpretation of what we have learned about human behavior. Because people develop differently does not mean that their development was governed by different processes. Diversity in behavior among people does not require resorting to diversity in underlying principles.

In any event, the separation between special and "regular" education, a separation accepted by both, was based on the assumption that retarded individuals required special theories: they were different kinds of human beings. Therefore, people trained to understand and work with retarded children could not work with normal children, and vice versa. For all practical purposes, the could not talk with each other! They segregated themselves from each other, and the thought that perhaps they should be together in the mainstream was considered ludicrous. The opposition to mainstreaming children was long contained in the political-administrative-social structure of departments and schools of education in our colleges and universities.

When we look at the public schools we would have seen much the same set of relationships, except that special class teachers *and* their students were now isolated from the mainstream. It is only in recent years that the special classroom was physically as well-appointed and situated as the regular one. Not all schools had special classes, and some children were bused to a school which did have one. To the rest of the school faculty, the special class teacher was a second-class citizen, someone who was expected to be a good custodian rather than an effective educator. Students were placed in the special class "for life"; there was no expectation that they would be returned to the regular class. And it was by no means infrequent for children to be placed in the special class because of their behavior rather than their academic inadequacy. Special classes were not numerous enough to accommodate all retarded children, and it should not be surprising that these classes were used selectively for purposes of behavioral control.

Aside from the special teacher, no one was concerned about what the children learned or at what rate, because they were not expected to learn very much and even that would take years. The school principal, who either by tradition or administrative regulations came from "regular" education, considered himself incompetent to advise the special class teacher and, not infrequently, the principal saw the special class either as an unasked for burden or a blemish on the school's image. In urban settings, there was a supervisor of special education who would visit the classroom occasionally. If the special class teachers felt alone and unwanted, they were feelings warranted by reality. It would be a gross mistake to see their situation in personal terms, or, better yet, to react to it in personal ways. *It was a situation pretty much viewed as "natural" by almost everyone, including the special class teacher who if she felt otherwise was careful not to articulate it. At best, the special class teacher would have been delighted to achieve separate but equal status.* Nor must we overlook the fact that what we have described had the sanction of the community.

The pressures for mainstreaming did not come from within educational institutions and that fact alone allows one to predict that these pressures would be resisted. It is not a case of the "good guys and the bad guys." Personalizing the polarities in such ways overlooks how both sides are reflecting tradition, history, *and* a fast-changing society. Institutional custom and practice are effective bulwarks to forces for change and this, we too easily forget, has both good and bad features. On the one hand, we do not want our institutions to change in response to every new fad or idea and, on the other hand, we do not want them blindly to preserve the status quo. In regard to mainstreaming, how one regards the oppositional stance of our schools and university training centers will depend on how one feels about mainstreaming. If one is for mainstreaming, then one will tend to view opposition as another instance of stone-age attitudes. If one is against mainstreaming, one will tend to view it as another misguided effort that will further dilute the quality of education of everyone.

The important point is that opposition to mainstreaming was predictable. To proceed as if that would not be the case is to deny the obvious about institutional custom and practice, especially when they have always been congruent with societal values and attitudes. What happens when societal attitudes begin to change, at least among segments effectively organized to bring about change, and that change, like mainstreaming, is generally seen as related to many other matters involving basic constitutional issues? As we indicated earlier, the legal and human issues emerging from segregation practices in regard to mentally retarded individuals can only be understood in the context of an upswell of protest against discriminating practices in regard to many other groups.

What frequently happens is that legislation is passed and public sentiments are translated into public policies having the force of law. From that point on, institutional opposition must conform to the law's intent and requirements or suffer sanctions. This, of course, does not mean that by virtue of the law, long-standing attitudes and practices have been dissolved and reconstituted to willingly accept its new thrust. One has to expect that ways will be sought to circumvent the new intent or to implement it minimally. This was true in the case of discrimination against any minority. Passing laws is far easier than getting them implemented consistent with both their spirit and their letter. This says less about human capacity to be socially perverse than it does about the strength of institutionalized custom and practice. We are not dealing with opposition based on "personality" but on institutional custom, organization, and values.

For example, Andelman (1976) writing about the Massachusetts mainstreaming law (Chapter 766) which served as a model for the federal law 94-142 passed in 1975, says:

> Teachers are also concerned with the accountability factor in 766. The law stipulates that parents of a child with special needs must approve the educational program designed for the child before such a program is implemented. Once the parents approve and sign the plan, the local school committee is legally bound to its specifications and required to produce the educational outcomes specified for the child. Teachers believe that they will be held responsible for failing to produce in children certain desired educational outcomes, when in fact, it is the larger system of public education which has failed to provide adequate resources for such outcomes even to be approximated . . . .
>
> For almost a decade teachers in our state have been negotiating their wages, hours, and conditions of employment. Hundreds of local collective bargaining agreements ( a number of them negotiated on a multi-year basis) have established the structure of the teachers' work day and the nature of working conditions as they pertain to instructional assignments, preparation time and responsibilities, access to professional development resources, in-service education, participation in curriculum development, and many other issues.
>
> Aware of the fact that there was bound to be some conflict between their present collective bargaining agreements and what the requirements of the new Chapter 766 might be, teachers hoped that regulations for the new law could be promulgated sometime during the school year of 1972-1973 so that the collective bargaining required for the 1974-1975 school year could take into account the shape and scope of the new mandate. However, regulations for Chapter 766 were not promulgated until the spring of 1974, and many of the provisions of those regulations did prove to be incompatible with many collective bargaining agreements.
>
> For example, Chapter 766 requires that meetings to plan special-needs programs for children are to be scheduled at the convenience of the child's parents. In

> an industrial state like Massachusetts, where both parents usually work, this means that many such school meetings have to be held after the school day and sometimes in the evening or on weekends. The requirements of a new state mandate that certain things may have to take place after the normal work day of the teacher are incompatible with collective bargaining agreements which define the structure and nature of the teacher's work day. After two years of collective bargaining, the problem is still not resolved in many communities [pp. 20-21].

Let us become concrete. We give below most of a summary of the federal law. It was prepared by the Children's Defense Fund (1976), an agency which, as its name implies, seeks to protect and enlarge the rights and opportunities of children.

> On November 29, 1975, the Education for All Handicapped Children Act (Public Law 94-142) was signed into law. This law builds upon, expands, and will eventually replace the Education of the Handicapped Act, including Part B which provides assistance to states, as amended by the Education Amendments of 1974 (Public Law 93-380). P.L. 94-142 will become fully effective on October 1, 1977 (Fiscal Year 1978).
>
> Both laws are extremely important for children who are handicapped, or misclassified as handicapped by their school districts, and for parents of these children because the laws (1) require states to provide special education and related services to children with special needs, (2) provide financial assistance to states and local school districts to develop appropriate programs and services and (3) establish and protect substantive and procedural rights for children and their parents.
>
> *State Plan*
>
> To be eligible for money under EHA-B, a state must develop policies and procedures in a "state plan" to insure that the requirements of the law are carried out in every school district in the state (whether or not that school district actually receives EHA-B money). State plans must be available to the public for comment and then submitted for approval to the Federal Bureau of Education for the Handicapped (BEH) in the U.S. Office of Education. The state plan must demonstrate that the state has established and will enforce the following:
>
> 1) *Full Services Goal*—a goal of providing all handicapped children with "full educational opportunities"; at least 50% of the EHA-B funds must be given to children who are receiving *no* education at all (i.e., are not in school) and children who are severely handicapped. The plan must provide a timetable showing how services, personnel, equipment and other resources will be developed and assigned in order to reach "full services".
> 2) *Due Process Safeguards*—policies and procedures describing due process safeguards which parents/children can use to challenge decisions of state and local officials about how a child has been identified, evaluated or placed in a special education program.
>
>    These safeguards must include:
>
>    a. prior notice before a child is evaluated or placed in a special program;
>    b. access to relevant school records;

c. an opportunity to obtain an independent evaluation of the child's special needs;

d. an impartial due process hearing to challenge any of the decisions described above; and

e. the designation of a "surrogate parent" to use these safeguards for each child who is a ward of the state or whose parent or guardian is unknown or unavailable.

3) *Least Restrictive Alternative—local and state procedures to assure that handicapped children are educated with non-handicapped children to the extent possible. Separate schools, special classes or other removal of any handicapped child from the regular program are only allowed if and when the school district can show that the use of a regular educational environment accompanied by supplementary aids and services is not adequate to give the child what he/she needs* [emphasis in original].

4) *Non Discriminatory Testing and Evaluation*—procedures showing that tests and other materials or methods used to evaluate a child's special needs are neither racially nor culturally discriminatory. The procedures should also assure that whatever materials or methods are used, they are not administered to a child in a discriminatory manner.

5) *Confidentiality of Information about Handicapped Children*—procedures to guarantee that information gathered about a child in the process of identifying and evaluating children who may have special educational needs, is kept confidential. State procedures must conform to regulations, issued in the February 27, 1976 Federal Register by the Commissioner of Education, which include requirements that parents must be given the opportunity to see relevant school records before any hearing is held on a matter of identification, evaluation or placement of a special needs child. These regulations also apply to the requirements for confidentiality of information under the Education for All Handicapped Children Act.

1) *Full Service Goal*—"free appropriate public education" must be available to all handicapped children ages 3-18 by September 1, 1978 and to all handicapped children 3-21 by September 1, 1980 unless, with regard to 3-5 year olds and 18-21 year olds, "inconsistent" with state law. States must place a priority in the use of their funds under this Act on two groups of children: 1) handicapped children who are *not* receiving an education, and 2) handicapped children with the most severe handicaps, within each disability, who are receiving an inadequate education.

2) *Due Process Safeguards*—as of October 1, 1977 the policies and procedures describing due process safeguards available to parents and children in any matter concerning a child's identification, evaluation or placement in an educational program must include:

a. prior notice to parents of any change in their child's program and written explanation in their primary language, of the procedures to be followed in effecting that change;

b. access to relevant school records;

c. an opportunity to obtain an independent evaluation of the child's special needs;

d. opportunity for an impartial due process hearing which must be conducted by the SEA or local or intermediate school district, but in no case by an employee "involved in the education or care of the child." In any hearing, parents have the right to be accompanied by a lawyer or any individual with special knowledge of the problems of special needs children, the right to present evidence, to confront, compel and cross-examine witnesses, and to obtain a transcript of the hearing and a written decision by the hearing officer. Parents have the right to appeal the hearing decision to the SEA and, if they are still dissatisfied the SEA ruling in federal or state court;

e. the right of a child to remain in his/her current placement (or, if trying to gain initial admission to school, in the regular school program) until the due process proceedings are completed; and

f. the designation of a "surrogate parent" to use the procedures outlines above on behalf of children who are wards of the state or whose parents or guardians are unknown or unavailable.

3) *Least Restrictive Alternative*—handicapped children including children in public and private institutions, must be educated as much as possible with children who are not handicapped.

4) *Non-Discriminatory Testing and Evaluation*—the tests and procedures used to evaluate a child's special needs must be racially and culturally non-discriminatory in both the way they are selected and the way they are administered, must be in the primary language or mode of communication of the child, and no one test or procedure can be used as the sole determinant of a child's educational program.

5) *Individualized Educational Plans*—written individualized educational plans for each child evaluated as handicapped must be developed and annually reviewed by a child's parents, teacher, and a designee of the school district. The plan must include statements of the child's present levels of educational performance, short and long-term goals for the child's performance, the specific criteria to measure the child's progress. Each school district must maintain records of the individualized education plan for each child.

6) *Personnel Development*—comprehensive system to develop and train both general and special education teachers and administrative personnel to carry out requirements of this law must be developed by the state, and each local school district must show how it will use and put into effect the system of personnel development.

7) *Participation of Children in Private Schools*—free special education and related services must be provided for handicapped children in private elementary and secondary schools if the children are placed or referred to private schools by the SEA or local school districts to fulfill the requirements of this law. The SEA must assure that private schools which provide programs for handicapped children meet the standards which apply to state and local public schools, and that handicapped children served by private schools are accorded all the same rights they would have if served in public schools.

To the reader unfamiliar with how Congress passes a law we recommend Bailey's (1950) *Congress Makes a Law*. It conveys well how legislation emerges from a welter of forces, past and present, leading inevitably to compromise and ambiguity. Those of us not saddled with responsibility for legislation underestimate the role of compromise, conflict, and competing values in shaping legislation. More recent and relevant to educational policy and implementation is Gallagher's (1975) brief but highly instructive article, "*Why the Government Breaks its Promises.*" Gallagher had an important post in the federal bureaucracy concerned with education and, as the title of the article suggests, he came away from that experience with a very realistic view of the inevitable gulf between the spirit and consequences of legislation.

> If a well-informed citizenry is the basis for a democratic society, we are in trouble. My own experience of three years in Washington convinces me that not one in a thousand citizens has even a rudimentary knowledge of how things get done in government. This section and the one following give a brief indication of some of the decision-making points in both the legislative and executive processes that determine the shape and magnitude of educational programs supported by the federal government.

Gallagher goes on to describe "The Rise and Fall of the National Institute of Education."

> The establishment of the National Institute of Education (NIE) in 1972 grew out of disappointment with the existing education research program within the U.S. Office of Education and a desire to set up an independent organization on the model of the National Institutes of Health. Some rhetoric to the effect that this institute would be a key to reform in American education was helpful in getting legislation establishing NIE through Congress.
>
> Two highly contradictory goals were presented at the same time: NIE would support major investigations into basic research on the learning characteristics of the child, and it would finance innovation programs testing major alternative educational strategies and procedures.
>
> Advertised as a big new $100 million-a-year education program, it actually turned out to have less than $20 million of new money, a sum inadequate for the ambitions or needs of American education. The rest were funds required merely to continue or complete already committed efforts.
>
> Three years ago, in testimony before the Select Sub-committee on Education in the House, I predicted a corrosive cycle of *overexpectation-underfunding-disillusion* for NIE unless limitations were squarely faced. One way to come to grips with reality is to examine the price tag for various educational products. Experience has given reasonable guidelines on what programs cost. With $20 million of new money, NIE could fund one major curriculum project, one experimental school, and some miscellaneous smaller projects. That is all. Obviously, legislators or budget examiners would be ill-advised to express quick disappointment that American education has not been reformed by NIE in one or two years' time.
>
> NIE found itself in another catch. The authorizing legislation provided that a National Council of Education Research be established as the policy-making board. But appointment to the board was made only through the White House, and this procedure was delayed until almost one year after the legislation was passed. The professional leadership of NIE was forced to choose between two courses, either of which was highly dangerous: they could embark on major new

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> directions clearly intended by the legislation and risk criticism for ignoring the intent of Congress that policy be determined by the National Council; or they could wait until the National Council was established and risk criticism for being unresponsive to the clear need to get started in innovative directions. The NIE leadership engaged in a little of each and was predictably criticized on both counts.
>
> Two years after its initial funding the National Institute of Education lies in shambles, struggling against administrative mishaps and lack of money. The Senate Appropriations Committee report recently suggested that NIE disband. What now? Again, there are two courses, neither of which holds much promise. One is to fire the whole leadership cadre of NIE on the "personal devil" theory; the other is to reorganize NIE into some other slot in the HEW complex in hope that some benefit will be gained by changing the label on the door. Meanwhile, cries for reform in education persist.

In discussing Public Law 94-142 we must constantly bear in mind that we will be dealing with ambiguities, compromises, expectations, and history. Before taking up a few of the provisions of Public Law 94-142 we should warn the reader that this federal law is very complex, containing many provisions for priorities, time schedules, funding levels, diagnostic and testing practices, advocacy for children, parental role, etc. This law, superceding a previous federal law, went into effect in October 1977. In late 1976, the *federal* regulations, spelling out in detail the criteria by which the law would be administered, were published. Those regulations determine the confines and substance of required *state* plans and regulations which, in turn, determine the plans and regulations required of *local* districts. Congress passed a law, the executive interprets and administers it, and so down the line. At every step of the way one is dealing with interpretations of interpretations. At this time, it is obviously impossible to evaluate the law's consequences. Some states such as Connecticut, California, and Massachusetts already have legislation consistent with Public Law 94-142, but most do not.

In the discussion that follows we examine some of the possible implications of a few of its provisions on two grounds: the historical background; and discussions with teachers and administrators in local school districts as well as with staff of state departments of education from several states.

In digesting these discussions we could come to only three firm conclusions. First, there was unanimity that the law would have massive consequences for public education, although there was no unanimity on what these would be. Second, implementation of the law would require an equally massive increase in time, energy, and paperwork for everyone. Third, despite the funding provisions in the law, the long-range effect would be to require local school districts to increase their school budgets. Less firm than these three conclusions was the view that one has to nurture a healthy skepticism about the relationship between what school people say they will do and what they actually do.

What follows has to be regarded not as an effort at prediction or evaluation but as a kind of analysis seeking to determine how past historical trends interacting with emerging attitudes and practices in today's realities can give us a glimpse of the future. Acceptance of mainstreaming as a concept and value is a socially moral triumph, but just as we had no good reason to accept the Supreme Court's 1954 desegregation decisions as "solving" a problem, we have no reason to view Public Law 94-142 as a solution to other forms of educational segregation. Social pendulums swing from one pole to the other, in part because of our tendency to underestimate how deeply ingrained practices and habits of thinking manage to subvert our better intentions. If what follows cannot be characterized as sunshine and light, it is not because we are cynics but because we cannot let our hopes blind us to obstacles.

Legislation is often a strange mixture of inkblot and unambiguous statements about intent, consequences, time tables, payments, and punishments. Public Law 94-142 is no exception. Far from being a criticism of this law, our characterization is intended to suggest that there is sometimes wisdom in the ambiguities. For example, take the item concerned with *Personnel Development.* Why is personnel development necessary? If the aim of the law is to mainstream handicapped children, why is personnel development necessary for special and regular education teachers? If mainstreaming is an effort to eradicate discriminating segregation, should not the law be explicit about phasing out special class teachers and classrooms? And why does the law require so many procedures and controls in an effort to insure that the law's intent will be implemented? Have the schools been so lawless about the rights of handicapped children, so discriminating, or so unresponsive as to require all of these new procedures and controls?

One might come away from a reading of the law with the conclusion that schools have not been for handicapped children but against them. The fact is that the contents of the law only make sense if one assumes that the forces for the law understood quite well the opposition on the part of school personnel, and that school personnel would have to be "helped" to adjust to new conditions not of their making. Indeed, without federal money as an incentive and a few years as a kind of grace period, the implication seems to be that mainstreaming would be impossible to institutionalize.

Where the law is most clear the rationale is the most implicit. This is another way of saying that those who wrote the law knew well that a radical transformation of the schools was being called for and that it would encounter opposition for some time to come. Mainstreaming, like school desegregation, would take place with "deliberate speed," a phrase from the 1954 Supreme Court desegregation decision. That phrase in the decision was ambiguous and wisely so, although none of the Supreme Court justices expected that a quarter of a century after the decision, school desgregation would still be encountering mammoth obstacles. A reading of Public Law

94-142 suggests that although its writers may have been aware of the nature of the opposition, their time perspective was far more optimistic than those of the Supreme Court justices in 1954.

What we have just said assumes that the intent of the law was to end segregation practices. That this is an unwarranted assumption is clearly suggested by the item *Least Restrictive Alternative*. What this item boils down to is that when a school district can show that the use of a regular educational environment accompanied by supplementary aids and services is not adequate to give the child what he or she needs, educational segregation is permissible. Given the law's implicit recognition of the opposition to mainstreaming, one does not need to be a cynic to predict that school districts would find ways to justify the continuation of special classes. It would be a rejection of every theory of individual and institutional behavior if school districts did not seek ways to continue what they regard as right and proper. This is not because they wish to discriminate in the pejorative sense against handicapped people, but because the law and the schools agree that there will be many cases where mainstreaming is impossible. The law and the schools are not in opposition about principles. *What the law intends is that the number of segregated individuals should be reduced somewhat.* We should then amend our prediction in this way: The schools will seek to mainstream more handicapped people but the bulk of these people will continue to be segregated. Public Law 94-142 intends a modest quantitative change and, in that respect it is miles apart from the 1954 decision which ruled segregation unconstitutional.

The word "mainstreaming" never appeared in the federal legislation, lending support to the position of some people who were influential in developing 94-142, that the law is being misinterpreted by different individuals and groups. It is a position fully congruent with our observations that in practice the law is not being implemented in the spirit of "separate but equal facilities are inherently unequal." Indeed, many of our observations suggest that in many school districts economic-budgetary considerations are far more potent than anything else in determining whether a handicapped child is mainstreamed or not mainstreamed to any extent.

This is a point that Scull (1977) emphasizes in relation to the decarceration movement. It is precisely when economic-budgetary considerations become primary that one has to set drastic limits to the relationship between the spirit and the consequences of legislation like Public Law 94-42.

Equally distressing, professional rivalries among school psychologists, teachers, guidance counselors, and other educational specialists frequently appear to be having adverse effects on the formulation and implementation of a handicapped child's individualized educational program (IEP), a "program" mandated by the law but the contents and processes of which are vague. We know of instances where professionals participating in the formulation of a child's IEP have not made recommendations to mainstream a child because of conflict with the school district's policies, raising the thorny, ethical question: Who is the client?

From a narrow, legalistic standpoint, it may be inappropriate to view Public Law 94-142 as an attempt at mainstreaming. But it is clearly not inappropriate to say that the law never could have been written and passed except in a climate suffused with the mainstreaming considerations explicitly contained in the 1954 desegregation decision. If the law is being "misinterpreted" as mainstreaming legislation, it is due less to what the law actually says and more to a perception of some people that the law was a derivative of anti-segregation sentiment. Given our observations about how the law is being implemented, the silence of the law about mainstreaming, as well as its emphasis on due process and least restrictive alternative, suggests that the law's evasiveness about mainstreaming is setting the stage for future court battles about mainstreaming as a value and practice.

Gallagher (1972) regards the controversy about labeling as fruitless and makes the case that from the standpoint of influencing and developing public policy, "labelling is a standard first step in trying to provide needed services" (P. 529). History is on Gallagher's side. Gallagher then goes on to emphasize what he considers more important than labeling: How opposition to mainstreaming is based on long-standing attitudes, practices, and school structure.

> There is yet another problem that has been swept gently under the educational rug, but that community activists and parent groups have called to our attention again. It is that special educational placement is too often an exclusionary process masquerading as a remedial process. The regular educational program is only too happy to refer their most troublesome cases to special education. In too many instances general educators only ask one thing of the special educational program—that it take those troublesome children and not give them back.
> The special educator has long held to a philosophy that he has been unable to implement in the educational system. A fine example of the theoretical position is presented by Reynolds (1971):
>
> > Special education should be arranged so that the normal home, school, and community life is maintained whenever feasible. Special education placements, particularly those involving separation from normal school and home life, should be made only after careful study and for compelling reasons [p. 425].
> >
> > The learning requirements of exceptional pupils, not only their etiological or medical classification, should determine the organization and administration of special education [p. 429].
>
> These are sentiments that most educators could easily subscribe to, yet data collected informally by the Office of Education suggested that special education was de facto, a permanent placement. In a number of large city school systems far less than 10 percent of the children placed in special education classes are ever re-

> turned to regular education. When one considers that the referral error could well be that high, it is easy to conclude that the bridge that should exist between special and regular education is, in fact, not really there. The traffic all goes in one direction.
>
> Ten parents have recently sued the state of Pennsylvania for excluding their retarded children from educational services, thus violating their right to equal educational opportunity, and have received a favorable judgment. The concept of *zero reject*, that no child shall be denied educational services appropriate to his level of development and need, seems to be on the verge of acceptance in our society. But such a victory will be a hollow one if what happens is merely a more sophisticated version of exclusion, this time to a special educational program that cannot deliver effective services and cannot negotiate that child back into the regular program when appropriate [Gallagher 1972, p. 529].

A note of reality. To someone unfamiliar with schools, Public Act 94-142 will appear as a step to initiate mainstreaming. The fact is that most handicapped pupils have always been mainstreamed in the public schools. In whatever ways schools may have defined a handicapped child there were never enough special classes in the schools to accommodate all the children so defined. Special classes for the mentally retarded go back a long way in our society but never has there been other than a very small fraction of these children in these classes. This was not because school personnel wanted few special classes but rather an unwillingness to bear the costs. In recent decades, due to state or federal subsidies special classes have been developed for other types of handicap such as perceptually impaired, learning disabled, and emotionally disturbed, but the number of children in these classes has always been a very small percent of those considered to have a handicap.

Why, then, this new push for mainstreaming? Several factors have been at work. First, it is obvious that if a handicapped child is placed in a special class it is not because of the diagnosis. If it were, how did the schools decide to place one handicapped child in the special class and not many others with the same diagnosis? The most frequent answer has been that the children placed in the special class were disturbing in the regular class. And not infrequently that said as much about teachers as it did about handicapped children. In short, special classes were a kind of dumping ground for "behavior problem" children, and the dumping was not always deserved. Second, the dramatic increase in special classes of all sorts in the past two decades was a direct consequence of state and federal subsidies that made it "profitable" for school systems to set up these classes. As one teacher said: "Now we have a lot of places to dump children." Third, particularly in our urban areas, special classes tended to have a disproportionate number of children from ethnic or racial minorities, a tendency that did not go unnoticed by more militant members of these minority groups. Fourth, if the trend for increased numbers of special classes continued, both the state and federal budgets would have to expand considerably. In a sense the process came full circle: Local school districts would not increase the number of special classes unless a good part of the costs came from the state or federal governments, and now these governments were concerned about the increasing costs. Not surprisingly, economics has been a potent factor. Economics, dumping, overrepresentation of minority groups—these together with a heightened sensitivity to civil rights account for the recent push for more mainstreaming. As for economics, let us listen to part of an editorial by Ryor (1976) as president of the National Education Association:

> For effective mainstreaming, regular classroom teachers must have the strong and coordinated backing of special education teachers and support personnel. Yet in these economically perilous times, the threat that boards will fire special education teachers as they put handicapped into regular classrooms hangs like a pall. What an ironic twist it will be if, in implementing this potentially valuable movement for the handicapped, we dispose of the teachers now best prepared to help them!
>
> If mainstreaming is to receive NEA support, it must emphasize thorough preparation of regular and special teachers for their roles. Mainstreaming is one of the most complex educational innovations ever undertaken, and for boards and administrators to plunge their schools into it without advance preparation carries great potential harm for regular and special students and for teachers as well. Without question, this basically good program, riding a wave of enthusiasm, has sometimes been pushed far too fast. Few states yet have carefully organized programs for making mainstreaming work. . . .
>
> Finally, it is pie-in-the-sky fantasy to envision effective mainstreaming without increased funds for additional teachers, auxiliary services, special supplies, and other necessities. Locally, mainstreaming reportedly threatens to bankrupt some districts that are already teetering on the brink of insolvency. Perhaps from a broader view, the answer is the same as for much other school financing: America must get its priorities lined up right. NEA's goal of one-third federal funding for education speaks eloquently to that point [Ryor 1976. p. 1].

The reader should not assume that opposition to mainstreaming only exists within the schools. In some communities opposition to mainstreaming has come from parents of handicapped children, either because they are satisfied with what their children are getting in segregated classes, or because they have little confidence that the regular classroom teacher will be able to integrate handicapped children. The parallels between the reactions of different groups in the 1954 desegregation decision (and the consequent busing) and to Public Law 94-142 are striking and should serve as a base for fashioning a realistic time perspective in regard to accomplishing goals of legislation (or court decisions) that require people to modify their attitudes, behavior, and practices. This, in fact, was a major consideration in the decision to acquaint the reader with some of the issues in the history of our educational system, a history that tells us again and again, that societal values, institutional practices, and blatant prejudice change slowly, and that these changes are always stormy. Someone once said that the ruling "law" of the fate of a public policy (its formulation, acceptance, and implementation) is "whose ox is being gored?" In regard to 94-142, as in the case of the 1954 desegregation decision, the oxen of many groups will be gored. For a concrete example of the real problems 94-142 brings in its wake, the reader should consult an article by Greenberg and Doolittle in The New York Times Magazine (December 11, 1977). The main heading is: "Can schools speak the language of the deaf?"; the subheading is : "A new federal law requires public schools to educate deaf children, but in states where 'mainstreaming' has been tried, it's created many problems."

One other factor deserves mention and it is no less potent for its lack of clear and direct explication. The polarization between school and community has become deeper and stormier. The fact is that school personnel have more and more become the objects of community hostility, derogation, and rejection. Never before have school programs and practices been so scrutinized and criticized. It is only somewhat of an exaggeration to say that school personnel are perceived as guilty until proven innocent. If that is an exaggeration of how the community views the school, it is nevertheless how school personnel feel.

It should occasion no surprise, therefore, that in the course of criticizing schools (e.g., types of tests used, confidentiality of files, criteria for suspension and explusion, racial discrimination, accountability) the questions of how handicapped children are diagnosed, managed, and educated would at some point come to center stage in a drama of deep and opposing currents of feeling. Mainstreaming in the past, as well today, cannot be seen as an educational issue or problem. It has always reflected the nature of the larger society, if only because deviancy or handicap are consequences of societal norms.

Our analysis has indicated that opposition to mainstreaming has characterized the history and structure of our educational institutions. One may, therefore, ask what has been the reception accorded Public Law 94-142? Before trying to answer that question, however, let us look at possible implications of the very title of the law: Education for *All* Handicapped Act.

## *All* Handicapped Children

Public Law 94-142 is not only for those diagnosed as mentally retarded. To anyone familiar with the recent history of advocate groups for the mentally retarded, what is remarkable is not the law itself but the lack of strong opposition by these advocate groups to the law. Ever since the early fifties, when the advocate groups became formidable, their efforts have been directed to spotlighting the need of retarded people for more equitable and humane public support. Put in another way, they were opposed to administrative setups that had responsibility for all handicapped people, which in practice meant that the mentally retarded would be, so to speak, low man on the totem pole.

For example, it was long the practice that the state department of mental health had responsibility for state programs, residential or otherwise, for mentally retarded people. This meant that they had responsibility for the mentally ill and the mentally retarded. It also meant that the latter got far less attention and support than the former, if for no other reason that the heads of these state agencies were psychiatrists who by virtue of their training had far greater interest in mental illness than in mental retardation. In *Exodus from Pandemonium* (1970), Blatt describes and discusses the "politics" of a state department of mental hygiene, and there is every reason to believe that his story is not atypical. A special act of the legislature was required for Blatt himself to be appointed in the Massachusetts Department of Mental Hygiene as Deputy Director for Mental Retardation because he was not a physician. It is small wonder that advocate groups began to fight for the administrative independence of programs for mentally retarded people. Two examples:

1. Up until the late fifties, Connecticut had no central state department of mental health. Each institution for mentally ill or mentally retarded people had a board of trustees appointed by and responsible to the governor. Pressure for a centralized agency began to mount for three reasons: growing public awareness of the extent of the mental health problem, the inadequacies of existing mental hospitals, and the combination of rising costs and the desire for efficiency. Plans were developed for the proposed state agency to have responsibility both for the mentally ill and the mentally retarded. A variety of advocate groups, aware as they were from other states of the consequences of this administrative arrangement, mounted a campaign for mental retardation to be placed in the department of health rather than in the new department of mental health. It is not accidental that between 1955 and 1960, Connecticut pioneered in new programs for mentally retarded people (Sarason, Grossman, and Zitnay 1972). During this period Connecticut may well have been the only state in which mental retardation was "independent." Within the past decade, the administrative separation of mental retardation from mental health has become more frequent.

2. In 1966, a subcommittee of the House of Representatives conducted a hearing on a proposed bill which contained funding provisions for special education which then meant mental retardation. The bureau head (Dr. Donald N. Bigelow) from the Office of Education who was testifying in favor of the bill made an eloquent plea the thrust of which was to bring special education, especially in regard to the training of teachers, into the mainstream of American education. This plea did not sit well with the subcommittee chairman who had fought for greater and separate recognition of

the field of mental retardation. He interpreted, wrongly in this instance, the bureau chief's plea as a kind of power grab that would have the familiar effect of robbing the field of its need for increased support. The hearing was on a Friday. By the end of the next Monday, mental retardation programs had been separated from the bureau.

On the surface the All Handicapped Children Act appears unobjectionable. Indeed, it appears a tremendous stride forward. But from the standpoint of partisans for mentally retarded children, especially those with a sense of history and knowledge of the culture of schools, there are grounds for unease. This stems from the fact that in the past fifteen years there has been an exponential growth in special classes for the emotionally disturbed, the learning disabled, the perceptually handicapped, and the hyperactive child. The push for those classes came from within and without the schools and among the leaders from without were those from the mental health professions who heretofore had never exercised such leadership on behalf of the mentally retarded. This is not said in criticism but simply as a matter of fact.

The array of special classes was for the most part for pupils not regarded as retarded but whose handicaps were either in some way disruptive of the normal class routine or put undue burdens on teachers who felt inadequate to deal with these children. These special classes and programs were also costly because they required a variety of educational and mental health specialists than was ever deemed necessary for special classes for the mentally retarded. The unease in all this stems from the fact that powering the passage of Public Law 94-142 was far less a concern for mentally retarded children than for the bewildering assortment of children the schools considered "handicapped" and in need of segregated programs. We put quotes around handicapped because the bases for such a label are ambiguous, prejudicial, and even invalid in many instances.

For example, few topics can engender more heated controversy than trying to get agreement on the criteria of emotional disturbance or the nature of learning disabilities. The unease can be now put in the form of a concrete question: is it not likely that in implementing the mainstreaming intent of Public Law 94-142, less attention and effort will be given to mentally retarded children than to the others encompassed by the act? This question has to be raised not to alert anyone to a conspiracy against mentally retarded children but to suggest that public laws are reactions to current perceptions of social problems. In the case of Public Law 94-142, the problems in our schools that seemed to need correction did not primarily center around mental retardation. This, of course, does not mean that the law was not concerned in an important way with mentally retarded children but rather that *in the process of implementing the law schools would tend to give greater attention to other kinds of children.* Traditions, structure, and perceived priorities will determine the law's effects. Individuals and institutions are rather adept at transforming a law's intent to their purposes. If that were not the case, legislative bodies would spend far less time than they do amending laws and writing remedial legislation.

Let us give attention to an article by Milofsky in the magazine section of the *New York Times* for Sunday, January 2, 1977. The heading of the article is as follows:

**Schooling for Kids No One Wants**

> A new Federal law requires "mainstreaming" of handicapped children into regular classes. It could prove as controversial as busing.

The heading reflects the feelings of many people. Milofsky's article is based on observations of mainstreaming in Massachusetts consequent to the passage of a 1972 state law containing "Chapter 766" on which federal law 94-142 was later based. Mainstreaming has been in effect for five years in Massachusetts.

> It requires local school districts to take responsibility for the education of all children who suffer from handicaps "arising from intellectual, sensory, emotional or physical factors, cerebral dysfunctions, perceptual factors, or other specific learning disabilities or any combination thereof." Chapter 766 discourages the labeling of handicapped children as much because of the "stigmatizing effect" this can have and instead emphasizes the individual needs of each child, determined through a "core evaluation" by a team consisting of a psychologist or social worker, doctor, or nurse, the child's present or most recent teacher, and a parent. The law mandates the involvement of parents and lay groups in "overseeing, evaluating, and operating special education programs" through regional and state advisory committees, a majority of whose members are parents of handicapped children.
>
> The Massachusetts law has enabled the mainstreaming of the "vast majority" of handicapped children into public schools, says Dr. Robert Audette, Associate Commissioner for Special Education in Massachusetts. Most of these children divide their time between regular and special classrooms, with only the most severely afflicted children in segregated classes.

Before giving some of Milofsky's observations, it should be noted that he gives examples of mainstreamed pupils: cerebral palsied, learning disabled, emotionally disturbed, and perceptually handicapped children. Mental retardation is never mentioned in the entire article. This may be an oversight but that is our point: The mentally retarded may well be overlooked. One could argue that it is a real step forward that our society is recognizing that there are many handicapped children with different types of conditions, and

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that no more attention should be given to one group such as the mentally retarded than to others. We agree.

However, as we pointed out in earlier chapters, ours is a society that places such a high value on "intelligence" that those who are considered to have less of it are devalued more than those who don't but have other characteristics interfering with school learning. As soon as a child is diagnosed as mentally retarded, the social-educational-productive worth of that child tends to be seen as less than if the label given the child was "emotionally disturbed" or "learning disabled"; the latter labels implying a more hopeful prognosis.

Every teacher has been told: "You teach children, not subject matter." If that admonition is so often honored in the breach, it is for the same reason that we so often react not to children but to labeled children, and the label does not have to be based on a formal diagnosis. So, if we seem to be partisans for mentally retarded pupils, it is not because we feel they are owed more than other children, which is as silly as saying that we should devote more attention to "gifted" than to "run-of-the-mill," but rather because in our society they are likely to get less than other children.

Let us turn to what Milofsky (1977) reports:

1. Mainstreaming means being in the mainstream part of the time: "Most of these children divide their time between regular and special classrooms, with only the most severely afflicted children in segregated classes." What that statement means is that some children are more segregated than others.
2. Many teachers feel unprepared for the responsibilities the Massachusetts law gives to them, and those school personnel who might be of help to teachers are too busy meeting their new responsibilities under the law. Some teachers, in the minority, report being able to cope with their new responsibilities.
3. Emotionally disturbed children are most disturbing, and school personnel feel that they are being required to deal with these children with very inadequate resources and no expectation that these resources will ever be available to them. In the City of Springfield "Most of these children are boys and many of them are black or Spanish-speaking [and] there is little hope of returning them to regular classes."
4. It is difficult for parents to assert their rights, in part because they do not know the law and in part because "they are intimidated by the whole thing."
5. For some towns and cities the law, despite its funding provisions, has created financial hardships.

## Consequences of Public Law 94–142

Passed in 1975, Public Law 94-142, building on a law passed in 1974, required that each state "has in effect a policy that assures all handicapped children the right to a free appropriate public education by October 1977 when funding was to begin. Even if one were writing many years after October 1977, it would be difficult to judge the law's consequences for reasons we will take up later. What is possible at this point is to present observations of how some school districts have reacted and prepared for the deadline. We do not claim that our observations are based on any kind of representative sampling. We have observed and talked to numerous school teachers, administrators, and policy makers – sufficient to give us some sense of the diversity of reaction and program.

The consequences of Public Law 94-142 will vary in terms of urban, suburban, and rural settings. Put in another way, the consequences will vary not only in terms of the size of the school district but also in terms of factors highly correlated with size: racial and ethnic composition, average achievement levels, serious problems of management and discipline, class size, frequency of families moving within a school district, teacher morale, and level of conflict between school personnel and the community. Only if we were living in another world, could one avoid predicting that the consequences in our urban settings will very likely be different from those in suburban and rural settings.

Someone once said that our urban school systems are really two systems, regular and special, and that the regular exceeds the special in size by a surprisingly small amount. In 1968, the President's Committee on Mental Retardation found that children from poverty and ghetto areas are fifteen times more likely to be diagnosed as mentally retarded than children from higher income families, and that nationally most of the retarded are found in our slums.

From the standpoint of urban school personnel, these and other types of special classes contain only a fraction of pupils who would be in them if more funds were available. As more than one urban school teacher has said: "I am a *regular* classroom teacher but don't kid yourself, I have a *special* class." This feeling on the part of urban school personnel increases in frequency and depth as one moves from elementary to middle to senior school levels.

These feelings have deepened in the past few years as cutbacks in funds have made for larger classes. But even before these cutbacks, teacher unions in our urban settings sought, often successfully, to insure that regular classroom teachers would not have to cope with children who in one way or another disrupted classroom routine and academic goals. From the standpoint of urban school personnel, the provision in Public Law 94-142 restricting funding to a small percent of pupils diagnosed as handicapped is a gross misperception of the size of the problem. Furthermore, from the standpoint of urban school personnel, the provisions of the law safeguarding the rights of children and parents will not only be costly in time but may well heighten the level of existing conflict between school and community. The fact that the law provides in-service training for school personnel to enable them to

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cope with the consequences of increased mainstreaming is explicit recognition that what is at issue is changing the attitudes of school personnel.

Our observations and discussions lead to the unfortunate conclusion that urban school systems are hardly prepared to implement Public Law 94-142. There are some school systems that had no plan at all several months before the deadline of October 1977. As one administrator in a large urban school system, who shall go unidentified, said:

> It's not that we don't want to be prepared but simply that we have not had the time, and frankly the energy, to think through what we should do and how we should do it. And to be completely truthful, I have not read the law and no one I know has either. We thank God when we get through a day or a week with our hearts and bodies intact, so when you ask what we are doing about the law, I get a sinking sensation. But then again that's exactly the way we feel, sinking.

We have quoted this nameless person's reactions not for the purpose of criticizing, or evaluating, or excusing, but to underline the stance of beleagurement that urban educators project.

Several urban school systems reported that they had already instituted mainstreaming. Although the reports differed in a number of respects, they tended to have several features in common. First, the creation of centers to which handicapped children were sent for academic subjects and in which they spend a significant portion of the day. Second, these pupils were "mainstreamed" with the other children in the gymnasium, lunch, music, etc. In some instances, children were bused daily to the center and the mainstreaming took place there; in other instances the center was in the school which the child would normally attend by virtue of place of residence. In one instance the center was in a mobile unit parked next to the school. Third, in almost every instance the descriptions provided us indicated that primary attention was being given to those labeled as emotionally disturbed or learning disabled. In other words, they seemed to be defining mainstreaming, far less in regard to mentally retarded pupils and far more to those with labels less suggestive of an intellectual deficit.

## Mainstreaming: Begging the Question

Mainstreaming is a concept powered by a value: Every effort should be made to allow a handicapped child to be an integral member of his peer age group and only when this is not possible should one employ the least restrictive alternative. The question arises, however, by what criteria should one resort to a least restrictive alternative? The answer to this question, of course, will in practice determine what mainstreaming is. It is relatively easy to get agreement on a verbally stated value, it is far more difficult to keep the agreement once that value is acted upon. Between intent and performance is a wide area mined by obstacles that often destroy the intent. Because you want to do "good" does not mean you will, or that if you do good that others will agree that your actions have been consistent with your values.

In practice, on what basis is the least restrictive alternative being decided and how consistent is it with the underlying value? The very fact that Public Law 94-142 was enacted, that it calls for in-service training, is testimony to the widespread belief that too frequently schools defined least restrictive alternative in ways congenial to their accustomed perception of their mission rather than what was in the best interests of certain children. This is not peculiar to schools but is characteristic of the way most organizations deal with troublesome individuals. Public Law 94-142 does not tell school systems how to decide the question; it puts the burden of proof on schools to justify resort to a least restrictive alternative. How do some schools seem to be justifying resort to the alternative? Keeping in mind that mainstreaming is in its infancy, and that our observations and discussions cannot be assumed to be representative, although they may turn out to be, the answer to the question is: relatively sincere tokenism. And by that confusing and self-contradictory answer we mean that there is sincere desire to comply with the law at the same time that a tremendous amount of time and energy go into the development and maintenance of the new type of segregated setting.

The very existence of these settings requires justification and use, and this often plays into the tendency to avoid asking to what extent the child is removed from the regular classroom because of the inadequacies of the classroom. This is not to say that the child labeled as handicapped is no problem in the classroom but rather that classroom problems are always a consequence of the interaction among characteristics of the child, the teacher, and other children. Problem behavior always has a situational component. Problem behavior is not "inside" or characteristic of a child, but a feature of a complex situation. For example, the most dramatic and sustained change in behavior we have ever seen has been when we could change a child's classroom, no mean diplomatic feat (Sarason, Levine, Goldenberg, Cherlin, and Bennett 1966). Consider the following case description:

> Tommy was a seven-year-old boy enrolled in the second grade. He was a well developed, goodlooking child of above-average intelligence who had entered the elementary school one year before when his family had moved into the area. Both academically and socially his performance and adjustment at the time were more than adequate and consistent with his abilities and talents. Although initially noted to be somewhat shy, he quickly made friends and was highly regarded by his first grade teacher.
>
> Tommy had had several of the usual childhood diseases (chicken pox and measles) and his last complete physical examination had been essentially negative. His teeth required attention, his vision was 20-20 and his hearing was normal. Thus, until the summer of 1964, Tommy was a relatively healthy, attractive and bright seven-year-old whose developmental and medical history was essentially

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unremarkable. Although he experienced some minor difficulty when he entered the new school situation, his adjustment, both academically and socially, was completely satisfactory.

During the summer vacation Tommy, delivering newspapers, was viciously attacked and bitten by a dog. As he went up to one of the houses on his paper route, the dog leaped on him, ripped his clothing, and bit him on the back and wrist. Tommy's screams eventually brought the dog's owner, who had to beat the dog repeatedly with a club in order to make him let go of the child.

Tommy was taken immediately to the office of a local doctor. His mother was notified and met Tommy there. His wounds were cauterized and injections administered for possible infection, and he was given sedatives. Soon after this experience Tommy became very quiet and extremely withdrawn, not talking or playing with other children, and refusing to leave his home. About three weeks later, he developed a cold and what was described as an "asthma attack" in which he was short of breath and had difficulty breathing. According to Tommy's mother it was during this time immediately following the incident with the dog that Tommy "woke up nights screaming and crying and at times running out of the house. He complained of a pounding in his head and imagined seeing things."

With the passage of time and the approach of the new school year Tommy's posttraumatic symptomatology appeared to become more involved and frightening. He began actively hallucinating and talking about "the ugly little man who's coming and putting bad feelings in my head." He became extremely frightened by loud sounds and constantly sought his mother's attention, reassurance, and protection. The only way in which she could calm him down would be to hold him and speak to him in a soft quiet manner. After numerous consultations with the family doctor, it was decided to put Tommy under the care of Dr. S., a "nerve specialist in town." Dr. S. placed Tommy on a regimen of medication (phenobarbital) to be taken three times a day after meals. It was his feeling that Tommy's condition was "an emotional reaction related to the strain stemming from his traumatic episode with a brutal dog." Tommy was told that the "pill he took to school would help him get rid of the spells."

It will be recalled that when Tommy initially entered the first grade he had experienced some minor difficulties in adjusting to his new living and school settings. It was during this period that he first came into contact with the school nurse. According to her he "often would come to me during the first few weeks of school complaining of a cold or stomach upset, but would be satisfied to just talk with me, have his temperature taken and return to class." Following his successful adjustment in school he contented himself with visiting the nurse whenever the holidays were drawing near, at which time he would wish her a happy holiday, and would often give her a card that he had made for her.

On returning to school this year Tommy was assigned to a second-grade class. At this time he was extremely nervous and upset, often running away from the loud noises in the schoolyard, and frequently hallucinating. His single anchor of security in school appeared to be the faith he placed in "the pill that would help my spells."

Tommy's second-grade teacher was an essentially unresponsive and reserved person. Her approach to teaching and to the children was all business. Her previous teaching experience had been confined to the parochial school setting and it was difficult for her to tolerate any interference with the academic standard and expectations she set for her students. Our observations in her classroom always revealed an academically competent teacher who was a stern and controlling disciplinarian and who utilized methods of shaming and rejecting to ensure the maintainance of an orderly efficient classroom. Although never harsh or uncontrolled in her interpersonal dealings with the children, neither would she allow herself or them to minimize their personal distance in a physical or psychological manner. In short, however competent her preparation and however well-intentioned her philosophy of teaching, she was a teacher who was essentially unable or unwilling to deal with the particular and idiosyncractic needs of her children. She tended to perceive these needs as unwelcomed and unrelated interruptions in the processes and aims of second-grade education.

In terms of the teacher's relationship with Tommy, although upset and somewhat frightened by his behavior, she perceived his spells as essentially interfering; that is to say, as discrete behaviors that erected unwanted barriers for her in her attempts to present specific material to the rest of the class. As far as his pills were concerned, she viewed the responsibility for his taking them as a matter of concern for Tommy, his parents, and his doctor. It was not within the scope of her definition of her professional responsibilities to become involved in a problem that was distracting in nature and took time away from her teaching duties. This being the case, and because she was unable to materially reorganize her perception of the situation, she was content to allow Tommy to utilize the nurse and her office as the appropriate setting for such interactions. This removed Tommy from her classroom during his periods of stress, and at the same time enabled her to maintain her firm position regarding the limited and relevant areas of responsibility for a teacher.

From this point on Tommy began spending more and more of his time at the nurse's office, and it was here that we first met him. According to the nurse, whenever Tommy was in school – his absence rate for the months of September and October were extremely high – he would come to her office to take his pill or "whenever he felt a spell coming on." They would spend these periods of time talking and Tommy would describe vividly his feelings and tell her about the "things he saw." Often when his crying and trembling subsided she would call his mother, talk with her at length, and eventually have Tommy taken home. Although the nurse knew about the incident with the dog, Tommy himself soon brought it up during one of his particularly difficult days. They spoke about it at some length and the nurse, in the context of sharing and understanding his fear, related to him several other such incidents involving other children. It was during the next day that we met Tommy. On that occasion Tommy had come to the nurse's office and wanted to go home. He was sobbing uncontrollably and seemed extremely nervous when we came into her office. After he calmed down a bit we all sat around while Tommy told us about "the little man I saw in my class who was coming to put bad things in my head." Once more he spent a good deal of time talking about the past summer, but finally began speaking of the terrible difficulty he had whenever he felt a spell coming on and would have to ask his teacher about letting him go out of the class to take his pill. He ended by informing us of his desire not to come to

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school anymore. After speaking with Tommy's mother and the teacher we decided eventually to change his class, and, for the interim, we put him on half days, both to minimize his anxiety-arousing contact with his teacher and to enable us to have the time to search for an appropriate second-grade teacher. During the time that he was attending school only in the afternoons he spent most of his time doing his schoolwork in the nurse's office after his teacher had given him his assignment. We were, as yet, relatively new in the school. Although we felt the need to have Tommy's class changed, we wanted time to get a better idea of exactly which teacher would be most appropriate for him. Since neither Tommy's current teacher nor the school nurse minded him using the nurse's office as his interim "classroom," everyone agreed to this arrangement. This enabled the nurse and ourselves to utilize that period of time to search for, become acquainted with, and brief whoever was to become Tommy's new teacher.

The following week we were in the lunchroom during a time of the day when the school nurse usually is not in her office. Tommy entered the lunchroom looking obviously upset and a bit bewildered. He was grasping his bottle of pills tightly in his hand as he looked around for his teacher. Before we could reach him or he could see us he turned to another teacher and hesitatingly began asking her permission to take his pill. The teacher, noting his degree of upset and the air of panic pervading his speech, immediately took his hand and accompanied him out of the lunchroom. They proceeded down the hall to a fountain where she helped Tommy take the pill. Once this was accomplished the teacher took Tommy to her room where he calmed down in a relatively short period of time. With her arm draped gently around his shoulders she then took him back to the lunchroom where he sat at her class's table for the remainder of the period. In this very short time we knew that we had found Tommy's next second-grade teacher.

This teacher was a young and attractive woman who was relatively inexperienced in terms of the number of years she had been teaching. Her class was generally a bit more noisy than others but always jumping with activity. She was an extremely warm and accepting person who seemed most effective and efficient when she became intimately involved with and in the ongoing activities of her children. Although she never lost control of her class there was a prevading atmosphere of disjointedness in the sense that many activities might be going on at the same time. This looseness quickly subsided whenever she raised her voice a bit above the well-modulated tone in which she usually addressed individual students. Her lessons were not always totally prepared and sometimes were lost in organizing particular events. She was extremely patient with the children and utilized well both verbal and nonverbal cues to communicate her feelings to them. More than anything else she seemed to enjoy teaching and being with her children, and this enjoyment appeared to be reciprocal.

We immediately met with the nurse and the "new" teacher to consider the transfer of Tommy to her class. We discussed Tommy's difficulties and the reasons we felt she might be helpful. The teacher, in turn, communicated her desire to have him placed in her class and informed us that, indeed, she had a great affection for him and hoped she would be able to help him. It was decided that the school nurse would be the most appropriate person to handle the transition in the sense that she would both help present the idea to Tommy and would remain the available resource whenever he felt the need to leave the classroom for any reason relating to his difficulties. It was also decided that the teacher would meet with us on a weekly basis to discuss Tommy's progress or lack of progress.

Tommy was transferred to his new class and immediately placed on a full-day schedule. During the first day the teacher spoke with Tommy about his difficulties and communicated to him how important it was to her that he get better and take his "spell pills." They established a procedure whereby he would not have to make any public statements in class prior to the granting of permission to leave the room to take his pill. Whenever Tommy was absent the teacher immediately called his home and spoke with him and his mother. Although Tommy was informed of the availability of the school nurse the teacher made it clear to him that his health, as well as his school work, was now also a joint venture between him and herself. To Tommy this meant that she very much wanted him to be able to talk with her about his feelings and his symptoms, and that her interest in him was as a "little boy" and not just as a "little student."

Tommy's progress after entering his new class was speedy and marked and was manifested in virtually all of the areas in which he had been experiencing profound difficulties. For purposes of clarity we describe these areas separately, although the reader should note that his behavior in each of these areas was influenced by, and interrelated with, his experiences in the others. Tommy's absence rate from school decreased almost immediately after he was placed in his new class. In terms of academic performance, Tommy rose to be one of the top five students in his class. According to his grades as well as his teacher's observations, he was beginning to fulfill the above-average potential noted in the first grade. Although before his shift he was unable to concentrate, had difficulty maintaining attention, and was unwilling to work at anything but his reading material, he was now actively involved in the varied projects occurring in his classroom. In general his over-all academic performance, as well as his social adjustment, was at a higher level, occurred in a context relatively free of the debilitating effects of undue loss of attention or the inability to concentrate, and appeared to have become more inner-directed and self-satisfying than externally imposed.

Of greatest import were the changes that occurred in Tommy's symptomatology and schedule of medication. The week before his transfer was particularly difficult for him. His symptoms (fearfulness, phobic reactions to loud noises, periods of fitful crying, and apparent hallucinatory experiences) were quite pronounced, and the occasions necessitating his approaching his teacher to request attention for his "spell pills" seemed to exacerbate these symptoms. At that time he was on phenobarbital. During the time after his transfer to his new class he showed evidence of a steady and progressive reduction in the intensity and duration of his psychotic symptomology. Soon after entering his new class the periods of fitful crying accompanying his pill-taking behavior subsided. He was gradually able to tolerate loud noises, although this aspect of his difficulty has been only recently eliminated. His hallucinatory experiences became less frequent and frightening, the more he spoke about them with his teacher. They, too, have not been reported for some time. In mid-December, approximately one month after his transfer, his medication was decreased to every other day and by late January was further reduced. At present all medications have been discontinued. In a recent meeting of the school nurse, the teacher, and ourselves the teacher in-

> formed us that she had not noticed any changes since Tommy has been off medication. Tommy's mother reported similar progress at home and except for the fact that "he occasionally has nightmares and wakes up crying," felt that "the worst is over." Our latest classroom observations and information would support this point of view.
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> As far as Tommy's relationship with the nurse was concerned, this soon underwent a change. Although we made it clear to Tommy that the nurse was available to him whenever he felt he needed her, the frequency and duration of his visits to her, decreased steadily after mid-November. Although he had been in her office virtually every day that he was in school and had remained there for significant periods of time, subsequent to his shifting of classes he began showing up less often and would remain for shorter periods. This change was a gradual process and occurred over a long span of time. By late December the nurse observed that Tommy "still comes to see me about little things and many times just to say 'Hello'." Her most recent report indicated that, "Tommy has not visited my office in almost three weeks, except to look for a hat in the lost and found box!" [pp. 221-26].

This case was described long before mainstreaming was in the air and also before there were classrooms for emotionally disturbed children. Today, the chances would be high that Tommy would not be in a regular classroom but in a "least restrictive alternative." The presence of such alternatives, together with Tommy's behavior and blatant psychopathology, would probably effectively short-circuit thinking of alternative ways to maintain him in the regular classroom.

We are not asserting that all children can be maintained in the regular classroom; we are asserting three things. First, no teacher is equally effective with all kinds of children. It may sound like an extreme statement but we have never seen a child labeled as a serious classroom problem who could not be effectively managed by another teacher in that school if one disregarded grade levels. Just as we emphasized in Chapter 2 that some parent-child relationships founder because of a mismatch between child and parental vulnerabilities, the same principle holds between pupil and teacher. To resort to a least restrictive alternative without considering this principle is to subvert the intent of mainstreaming. The first question is not what is the least restrictive alternative, but how seriously has one attempted to match the child to a regular classroom teacher.

The second point, illustrated by Tommy's case, is the significance of the role of "consultant" in the school, whose task it is to support both teacher and child, but who essentially acts as an advocate for the child. The third point is that when least restrictive alternatives are not available, necessity can truly become the mother of invention. And while not all such inventions are successful, the rate of success has been quite encouraging. What we have observed about mainstreaming is that it has led to procedural and administrative inventions that are obviously different from the inventions described in Tommy's case.

There is another significance to Tommy's case and it has to do with the Yale Psycho-Educational Clinic, which was in existence between 1962-1972 (Sarason, et al. 1966; Kaplan and Sarason 1970). Clinic personnel worked in the schools and in the classrooms. To understand the role of the clinic member in the school, as well as to glimpse the significance of the rationale for mainstreaming, we give the introductory comments of a clinic member to the faculty of a school before any relationship between school and clinic was assumed.

> For a number of years some of us in the Department of Psychology at Yale have been engaged in different research projects involving elementary schools. In addition to our experiences in the elementary schools, some of us have long been interested in various aspects of special education and in the preparation of teachers. As a consequence, we became increasingly interested in the day-to-day problems facing schools in general and teachers in particular. Let me say right off that there are two conclusions to which we have come. The first is that anyone who teaches in the public schools for less than $15,000 per year ought to have his head examined. The second conclusion is that a law ought to be passed making it mandatory for each parent to teach a class by himself for a day each year. Although these recommendations may not solve all problems, they would certainly help bring about changes that all of us would agree are necessary. All of this is by way of saying that our experiences have given us an understanding of what is involved in teaching and managing a large group of children, each of whom is a distinct character, for several hours each day over a period of 10 months. It is not flattery but rather strong conviction underlying the statement that the classroom teacher performs one of the most difficult tasks asked of any professional person. It would indeed be nice if all a teacher had to do was to teach. You know, and I know, that a teacher is a parent, a social worker, a psychologist, and a record-keeping clerk. Hopefully there is time to teach once the duties associated with these other roles are discharged. We are living at a time when everyone seems to be an expert on the schools and ignorance seems to be no barrier to articulating strong opinions. There is no doubt, as I am sure you will agree, that there is much one can criticize about schools, but there is also no doubt that unless one understands what a school is like and what it is faced with in its day-to-day operation the benefits we would like to see from these changes will not be so great as they should be.
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> One of the most staggering problems facing our society concerns the degree of serious maladjustment in many people. One has only to look at the size and number of our mental hospitals, psychiatric clinics, reformatories and the like to begin to grasp how enormous a problem this is. We are talking about millions of people and billions of dollars. What needs to be stressed is that in the foreseeable future we will have neither the personnel nor the facilities to give these troubled people the quality of treatment they need. In all honesty I must also say that for many of these people our knowledge and treatment procedures leave much to be desired.
>
> As a result of our experiences, we at the Psycho-Educational Clinic in the Yale Department of psychology have come to two conclusions: first, far too little is being done either to try to prevent the occurrence of problems or to spot them at those points in the individual's life where with a little effort a lot may be ac-

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complished. Second, if we believe what we say, we ought in a very limited kind of way to attempt to see what we can do. I do not have to emphasize to a group of elementary-school teachers the significance of a preventive approach to problems in the early grades. As I am sure all of you know as well as, if not better than I, you are faced daily with children whose behavior, learning difficulties, and interpersonal relations, (with you or other children) arouse in you concern, bewilderment, anger, and a lot of other reactions. On the basis of all the talks and meetings we have had over the years with teachers there would seem to be in any one classroom of 25 children anywhere from three to six children about whom the teacher is concerned in the sense that she has a question about their academic learning and personal adjustment in the school setting.

What do we propose to do? It is easier for me to tell you what we do *not* intend to do. For one thing, we do not intend to come into a school in order to see how many problem children we can refer out to various agencies. There is no doubt that you know a lot of children who could utilize the services of a child-guidance clinic or family service society. To come in with the intent of referring them out is both unfair and unrealistic because these agencies, particularly the child-guidance clinics are overwhelmed with cases and generally have long waiting lists. Even if the child-guidance clinic could take the child on, it would take them quite a while to get to first base with the child and in the meantime you still have that child in your class. Treatment procedures are neither that quick nor effective to allow you to expect that your difficulties with the child are over once you know he is being seen in a clinic. The question we have asked of ourselves is how can we be of help to the teacher in the here and now with whatever questions and problems she raises with us. In short, we want to see how we can be of help within the confines of the school.

It is not our purpose to come into a school to sit and talk to teachers, however helpful and interesting that might be. When we say we want to be helpful in the here and now within the confines of the school, we mean that in addition to talking with the teacher about the child we have to be able to observe that child in the context of the classroom in which the problem manifests itself. For help to be meaningful and practical it must be based on what actually goes on in the classroom setting. For example, it is in our experience no particular help to a teacher to be told that a child needs individual attention, a need which differentiates him not at all from the rest of us. What a teacher wants to know is when, how, and for what goals this "individual attention" will occur, and this requires a first-hand knowledge of what is going on.

We do not view ourselves in the schools as people to whom questions are directed and from whom answers will be forthcoming. Life and the helping process are not that simple. We have no easy answers, but we have a way of functioning that involves us in a relationship to the teacher and the classroom and that together we can come up with concrete ideas and plans that we feel will be helpful to a particular child. We are not the experts who can come up with solutions even though we have no first-hand knowledge of the context in which the problem has been identified.

I hope I have made clear that when we say we want to help it means that we want to talk to the teacher, observe in the classroom, talk again to the teacher, and together come up with a plan of action that with persistence, patience, and

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> consistency gives promise of bringing about change. It is not a quick process and it is certainly not an easy one.
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> I cannot state too strongly that we are not coming into the schools with the intent of criticizing or passing judgment on anyone. We are nobody's private FBI or counterintelligence service. We are not the agent of the principal or some other administrative hierarchy or power structure of the school system. We have no special strength or power except that which flows from our being able to establish a situation of mutual trust between teachers and ourselves. To the extent that we can demonstrate to you by our manner, gesture, and verbalization that we want to help, to that extent we make the development of this mutual trust more likely and quickly to occur.
>
> There is one aspect of the way we function that I think needs some elaboration. I have already told you why it is essential for us, if our efforts are to be maximally useful, that we spend time in the classroom. Another reason this is essential resides in the one advantage we have over the teacher, i.e., we do not have the awesome responsibility of having to handle a large group of young characters five days a week for several hours each day, a responsibility that makes dispassionate observation and clear thinking extraordinarily difficult. We can enjoy the luxury of being in the classroom without the responsibility of the teacher for managing and thinking about 25 or more unique personalities. We do not envy you although I am quite sure that you will envy us for not having your responsibilities. It is precisely because we are "free" that we can observe what is going on in a way not usually possible for a teacher.
>
> In order for us to help in a school it is crucial that we know that school as a physical entity and as a kind of social organization. Consequently, we usually make the request that for the first six weeks or so we visit classrooms and get to know you and what you do in different grades without any obligation to get involved with any problem. A school and a classroom are not simple settings and it takes several weeks until we get the feeling of familiarity. We will be here on certain days of the week so that you can count on when we will be here. We try to spend a day and a half a week in each school.
>
> We do not know to what extent we can be of help to you. We do not present ourselves as experts who have answers. We have much to learn about this helping process. If our previous work with teachers is any guide, the type of service we want to develop is one that they feel they need. The only thing we can guarantee you is that we want to learn and to help. We have much to learn from you, and together we may be able to be of help to children in school [Sarason et al. 1966, pp. 59-62].

The thrust of the clinic's rationale was, obviously, to keep children in the regular classrooms. There were some special classes for the mentally retarded but none for any other type of handicap; children were not placed in special classes because they were retarded but because they were troublesome, and if state regulations did not set a limit to the size of these classes they would have been crowded in the extreme. Those were the days when pressure was mounting for more types of special classes and more community facilities to deal with children with school problems. The clinic's aim was to see if the pressure to segregate and refer could be blunted. Those were also the days when suspensions and expulsions were frequent and not subject to the legal, civil rights procedures of today.

In early 1977, we interviewed Mr. Murray Rothman, long the Director for Special Education in the New Haven schools, to discuss what was being done about mainstreaming. What is relevant to the present discussion is that for several years before Public Law 94-142 was enacted, he had been able to place in each of nine schools a person whose major function was to be whatever help possible to classroom teachers in regard to their pupils. This he had done, he said, spontaneously as a result of his close working relationship with the Yale Psycho-Educational Clinic, and witnessing firsthand how the role of a clinic member in school helped teachers to maintain handicapped children in the regular classroom. He then reported that the nine schools which had a person who functioned in the cliniclike role referred significantly fewer children to "least restrictive alternatives." It was his opinion that if he were able to have such a person in each school, the need for these alternatives would not be eliminated but discernibly diluted in strength. This opinion finds clear support in an experimental study by Cantrell and Cantrell (1976), based on a rationale quite similar to that employed by the Yale Psycho-Education clinic and Mr. Rothman.

Finally, mention must be made here of a recent study by Lorion (1977) on individualized education for learning disabled children. The study is noteworthy in three respects that bear directly on mainstreaming. First, formulating a diagnostic-prescriptive program for each schoolchild took between three to four hours. Second, the prescriptive core took into account the child, the teacher, and the classroom, and was very specific and concrete. Third, the prescribers were available to teachers to answer any questions and, equally important, came into the classroom to observe and help.

At the end of the first year of the project, the educational gains of the students were remarkable and general. The significance of Lorion's study is in its demonstration of how integrated diagnosis, prescription, and follow-through must be if the individual needs of students and teachers are to be met. Public Law 94-142 mandates an individual educational prescription for each handicapped child, but to be done well this not only requires time but harmonious relationships among school personnel. "Harmoniousness" is only possible when each person makes a contribution at the same time that the person makes a contribution at the same time that the person feels his or her needs are being recognized and met. Such an ambience cannot be legislated and it is no secret that it is only rarely found in our schools. An individual educational prescription is not a collection of test scores and generalizations so vague and nondiscriminating as to remind one of the glittering generalities of a horoscope. It is, as in the case of Lorion's study, a formulation specific to the student and the teacher. It does not assume the teacher to be a mind reader but someone who needs to know what is expected and why.

The individual prescription is a plan of action not for a student by a teacher but for a student and diverse personnel in need of each other. As we pointed out in an earlier chapter, Binet knew this but those who came after him riveted their attention on his tests and missed what he called "mental orthopedics." For Binet, tests had no meaning if they could not be translated into specific actions in the classroom, and he knew this was no easy task. He never dreamed his test would become a task so routinized, so devoid of specificity for action, so assembly line in character, as to defeat everyone's purposes. Public Law 94-142 may well lock this routinization in concrete, not because that is its purpose but because it does not confront some of the major realities of the culture of schools.

In summary, mainstreaming, both in terms of its current conceptual status and possible consequences, has to be seen from a historical perspective that brings together long-standing educational practices and attitudes, reflecting the larger society and the forces for social change. Until recently, the conflict between forces for tradition and change had little impact on segregation practices within schools, so educational segregation of the mentally retarded went unchallenged.

However, as the conflict gathered strength, and began to be manifested in schools, segregation of other "handicapped" groups became much more frequent. The forces against educational segregation practices came primarily from outside the schools. Public Law 94-142 is the culmination of their efforts. However, these forces may have vastly overestimated the power of legislation to change the structure of schools in ways appropriate to the intent of mainstreaming or the attitudes of school personnel. This must be understood not in moral terms but in light of the weight of long traditions.

Preliminary observations suggest that many school systems are unprepared to deal with mainstreaming. Some are approaching it in ways that only minimally begin to meet the intent of mainstreaming: to avoid the negative effects of stigmatizing labels: and to foster tolerance and mutual understanding between handicapped and nonhandicapped youngsters. These preliminary observations also suggest that school personnel are perceiving mainstreaming largely in terms of nonretarded, handicapped pupils.

It appears that, in the future as in the past, those stigmatized with the label mentally retarded will benefit least from the intended benefits of mainstreaming. But as one school administrator in a large urban setting said: "Why not say that the mentally retarded will be harmed the least from the coming chaos!" Such a comment may well be unduly cynical but it does reflect the mixture of anxiety, impotence, puzzlement, and pressure which school personnel in our urban settings feel. To overlook such feelings is to do an injustice both to school personnel and to those who fought for mainstreaming. Between enactment of a law and practices consistent with it

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is the whole, poorly understood problem of how to effect institutional change.

## A Major Deficiency of Public Law 94–142

We have already said that the law can be construed as criticism of what our schools have been. Handicapped and nonhandicapped students are human beings, not different species, and their basic makeup in no way justifies educational practices that assume that the needs they have for social intercourse, personal growth and expression, and a sense of mastery, are so different that one must apply different theories of human behavior to the two groups. If we respond to the handicapped as if basically different, we rob them and us of the experience of similarity and communality. We can no longer allow schools to segregate children and educational personnel, based on conceptions that are invalid and morally flawed. That is the message that Public Law 94-142 implies.

But where did school personnel learn such conceptions? There are two answers, one general and one specific. The general answer is that they learned those conceptions, and justified them morally, by growing up in a society in which these conceptions and moral precepts were seen as valid, right, and proper. In short, they learned them in the same ways everybody else learned them.

The specific answer is that school personnel are graduates of our colleges and universities. It is there that they learn there are at least two types of human beings and if you choose to work with one of them you render yourself *legally* and conceptually incompetent to work with the others. As we pointed out earlier in this chapter, what we see in our public schools is a mirror image of what exists in colleges and universities. *One of the clearest implications of Public Law 94-142 is that the gulf between the special and regular education has to be bridged, and yet the law requires no change in our college and university training centers.*

We, therefore, have the situation in which the law mandates changes in our schools. School personnel must change in attitude, thinking, and practice, at the same time our training centers educate school personnel in the traditions of the "most restrictive alternative." As an educational administrator in Milofsky's article says:

> "It's fine to pass laws," he says, "but it's the teachers who are stuck trying to implement them. Nothing in the law requires in-service training on a systematic basis and a lot of the teachers have no experience in dealing with handicapped kids. We think 766 should require major changes at the undergraduate level. If there are

going to be laws like this, they should be taken into account during a teacher's educational training."

At its root, mainstreaming is a moral issue. It raises age-old questions: How do we want to live with each other? On what basis should we give priority to one value over another? How far does the majority want to go in accommodating the needs of the minority? The emergence of mainstreaming as an issue raises but does not directly confront these questions. To the extent that we put discussion of mainstreaming in the content of education and schools, we are likely to find ourselves mired in controversies centering around law, procedures, administration, and funding. These are legitimate controversies because they deal with practical, day-to-day matters that affect the lives of everyone. But the level of difficulty we encounter in dealing with these matters will ultimately be determined by the charity with which the moral issue is formulated. At the very least it should make us more aware of two things: So-called practical matters or problems are always reflections of moral issues, and differences in moral stance have very practical consequences.

# The Education of All Handicapped Children Act

## Part A - General Provisions
## Short title; Statement of Findings & Purpose

(a) This title may be cited as the "Education of the Handicapped Act."

(b) The Congress finds that --

"(1) there are more than eight million handicapped children in the United States today;

"(2) the special educational needs of such children are not being fully met;

"(3) more than half of the handicapped children in the United States do no (sic) receive appropriate educational services which would enable them to have full equality of opportunity;

"(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

"(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

"(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

"(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

"(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

"(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

"(c) It is the purpose of this Act to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children".

From: Bates, P. (Ed.). Mainstreaming: Our current knowledge base.
Minneapolis: University of Minnesota, Department of Psychoeducational
Studies, 1981.

# The Whys and Hows of Mainstreaming: A Philosophical Critique

5

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Suppose the state decreed that all sorts of odd people had the right to spend every evening in your living room. Or suppose that you had been neglected and shunted aside for many years and suddenly the powers that be placed you under the care of people who had no real appreciation of your needs. Or suppose that you had worked for a long time to provide a special environment for certain young people and their friends and the federal government said that such places were no longer legal. Or suppose that you were running a business and the current regulations required the retraining of your entire work force for a variety of new functions but only a few dollars a week were allotted for the purpose. How would you feel? Affronted? Frustrated? Perhaps outraged?

The preceding attitudes, no doubt often generated by inadequate understanding, have been voiced by some participants in the educational drama created by The Education for All Handicapped Children Act of 1975, Public Law 94-142.[1] This statute mandates the integration of children and youth with sensory, physiological, and intellectual disabilities into the mainstream of public school education and authorized funding to the states, which could rise to $3 billion a year by 1982, to carry out the mandate. Of course, the provisions of the statute and the federal rules and regulations issued in 1977 have not necessitated overt measures so hopelessly extreme as the suppositions with which this chapter opens, but some

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[1] Inasmuch as much of this chapter focuses on Public Law 94-142, it should be noted that at the time of publication the future of the law in the Congress was uncertain.

may come close. The unfounded fantasies about mainstreaming handicapped children and youth are real enough to the people who hold them.

Public Law 94-142 is an extraordinary once-in-a-generation law. Its challenges threaten to unsettle many deeply entrenched educational habits and to tamper with many delicate social adjustments. But they also hold out a promise to millions of parents and their handicapped children that new kinds of help and support are on the way. How are the deeply humane and proper intents of this law to be fulfilled, then? Can they be? What would it take? But first, what does the law itself mean? A critical analysis of the basic principles of Public Law 94-142, as stated or implied, is presented in this chapter. My theses are as follows:

1. The statute is essentially a human rights document.
2. Several long-vexing conflicts over educational aims and processes will be heightened if this law is taken at all seriously, which it must be.
3. Learning how to work with the conflicts is one of the most important changes likely to be laid on this or the next generation of educators.
4. Certain resolutions are already demanded or implied by the legislators' intentions in enacting this law.
5. Some of these resolutions can be heartily endorsed but others seem to be as yet ill-thought-out and imminently dangerous.

## The Background: An Unfinished Revolution

### The Setting

Pursuant to the 1975 legislation, the National Advisory Committee on the Handicapped (NACH) was formed that year and began to submit annual reports interpreting the intent of Congress and making recommendations for the administration of the law (see NACH 1975, 1976, 1977). Inasmuch as almost all the recent literature on the subject has assumed, intentionally or not, the terms set by these reports, the background observations presented here are derived principally from them.

NACH reported that some 8 million persons aged 0-19 are affected by Public Law 94-142, that 45 per cent "do not receive an education comparable in quality and comprehensiveness to that offered to nonhandicapped youngsters," and that one million "are denied education altogether" (NACH, 1976, p. 18). Actual program adequacy may well be the experience of less than 45 per cent. When we compared these figures with the over-60-per cent neglect rate of 1969 and the nearly 90 per cent neglect rate of the late 1940s, we see that the succession of court actions and state and federal legislation since the mid-1960s, largely in response to consumer actions, has markedly increased educational opportunities for disabled persons. 7 Public Law 94-142, if it is adequately funded and administered, is a gargantuan breakthrough in education for these people.

The most important principle of the law, according to NACH (1976) is that education for all handicapped children and youth is a "fundamental right" (p. 5), one, moreover, that may not be abridged for lack of funds or determined other than in a way "geared to [the children's and youth's] particular needs and aspirations" (p. 1). As a matter of right, these persons are to be generally treated in both schools and society "not on the basis of their disabilities but on the basis of their worth as human beings" (NACH, 1976, p. 7). Public Law 94-142 was given no expiration date, unlike most education legislation. It is the expression of a basic public commitment, one that is not expected to be changed or diminished to the end of time. As such it is "an unfinished revolution" in human rights (NACH, 1976; Weintraub & Abeson, 1976). The single most important indicator that the revolution is working, therefore, will be a change in public attitudes toward handicapped persons (NACH, 1976, p. 15).

The chief aim of the law is to end the unnecessary isolation of handicapped persons from society at large by first placing them, as children and youth, in educational environments which are "least restrictive" according to their needs and potentials, and then providing them with supportive services in those environments. This is the principal meaning of the otherwise misleading and elusive term "mainstreaming," although it is far from the total meaning of the mandated program itself.

## Major Principles

Several major consequences, which are implicit in the NACH recommendations, flow from the perspective of basic human rights which NACH drew from the language of Public Law 94-142:

1. Although the special focus is on the traditional years of public schooling, publicly facilitated care should begin at birth and extend for some individuals beyond the age of

21. Additional emphasis therefore is placed on preschool programs, career and vocational programs, and development of life-long learning concepts.

2. A carefully developed and monitored individualized educational program (IEP) is provided for in Public Law 94-142; it is essential to the success of mainstreaming efforts with handicapped children and youth. The IEP is seen by NACH as reflecting a general trend in education and as a superior teaching practice. Achieving competency in writing IEPs and accepting accountability for them requires the massive retraining of current personnel, the employment of new advocate-specialists, the initiation of unaccustomed modes of cooperation between schools and families. Three or more planning conferences a year of the concerned persons are recommended for each child. The IEP is not a binding contract but, rather, an instructional plan, designed cooperatively, that meets a handicapped student's educational needs at a particular time. IEPs are essential for successful mainstreaming.

3. Physical education and experience with arts and crafts will play a prominent role in enabling handicapped persons to reach out to others and to become active participants in their communities. I see NACH's view as significantly limited in this respect in that its rationale for such involvement is explicitly based on only two concepts: (a) development of recreational and leisure-time skills and (b) reaching out. I would add two more: (c) wide-ranging, creative activity throughout all the educational process, as mediated especially through the arts and crafts, and (d) reaching nonhandicapped people as well to help them to recognize that they have much to gain from participation in education and other societal activities with handicapped persons. My two additions are consistent with NACH's concern for the education of the "whole child."

4. Placement of handicapped with nonhandicapped students is to occur "to the maximum extent possible," according to the statutory language. Contrary to the popular image, most disabled students are able to fit into such placements without major adjustments, according to NACH. The chief danger would reside in our failure to retain and develop complementary facilities for mentally retarded, speech and hearing impaired, visually handicapped, emotionally disturbed, and orthopedically and other health- impaired students, as well as for those with specific learning disabilities (who need them), who are all termed "handicapped" in the statute (sec. 602). Another danger lies in our adopting a "dumping" procedure rather than following the principle of placement according to the least restrictive environment. The only educationally sound and humane program is one that builds open, effective communi-

cation and community. Such a program is not achieved by simply inserting new participants into a classroom with no regard for the effects on the total human ecology of that classroom.

5. Occasionally in the Congressional debates and the NACH reports we see "the child"included among the persons who would set short- and long-term objectives and who would develop, 9 evaluate, and revise the IEP for "the child." I would like to raise this minor theme to a major one. We are talking about the education of human beings; as such the process is not strictly "for the child" (the usual language) but is one in which the person chiefly involved must be an active, initiating, sharing participant. Otherwise, in my view, it is not education at all but mere training or, worse, a process in which a human being is made solely a passive object of externally enforced authority.

A comprehensive philosophy of mainstreaming will include each of the preceding features, all of which are derived from a fundamentally moral concept of human right for which this society was deemed ready by the Congress. More is said about this essential notion in due course.

### Canada: A Judicial Mandate

In two other countries, Great Britain and Canada, similar mainstreaming moves are underway. A landmark decision by the Supreme Court of Canada on August 11, 1978, provided, in a test of secs. 136 and 138 of the School Act, that all children (in this case including a 9-year old with cerebral palsy) have a right to places in school or school programs in the districts where they live or to schooling elsewhere, which is paid for by the government. An absence from school of one year or longer, moreover, was deemed to be an unacceptable time span for finding a suitable program for a child (Cruickshank, 1978). This judicial ruling is far from the legislative mandate of Public Law 94-142; it sounds like U.S. court decisions in the 1960s and 1970s that supported the rapid development of special education facilities here. However, the grounding in principle is similar.

### Great Britian: On the Way

In 1974, the British Parliament commissioned a study of "special educational needs" headed up by philosopher Mary Warnock. Although few philosophical principles are enunciated in the 430-page final report (Warnock, 1978), several are presupposed throughout. The following quotation indicates a human rights attitude which is similar to that of U.S. documents:

> Why educate such children at all?.... Our answer is that education, as we conceive it, is a good, and a specifically human good, to which all human beings are entitled. There exists, therefore, a clear obligation to educate the most severely disabled for no other reason than that they are human. No civilised society can be content just to look after these children; it must all the time seek ways of helping them, however slowly, towards the educational goals we have identified....
>
> Moreover there are some children with disabilities who, through education along the common lines we advocate, may be able to lead a life very little poorer in quality than that of the non-handicapped child, whereas without this kind of education they might face a life of dependence or even institutionalisation. Education in such cases makes the difference between a proper and enjoyable life and something less than we believe life should be. From the point of view of the other members of the family, too, the process of drawing a severely handicapped child into the educational system may, through its very normality, help to maintain the effectiveness, stability and cohesion of the family unit....
>
> Those who work with children with special educational needs should regard themselves as having a crucial and developing role in a society which is now committed, not merely to tending and caring for its handicapped members, as a matter of charity, but to educating them as a matter of right and to developing their potential to the full. (pp. 6-7)

The British report includes learning disabilities among the handicaps of "children and young people with special educational needs," and the authors estimated that one in five or six students suffer the disability at some time in their school careers. The focus of the Warnock report is emphatically not on "special" set-apart services but on "any form of additional help" (pp. 6, 46). The goals of education are assumed to be applicable to all children and youth. Therefore the report recommends a program extending from preschool into adulthood, including, for some persons, "significant living without work" (p. ix); special emphasis is given to early childhood education and to concern for young people aged 16 and over. The report retains the concept of special classes and units but also recommends that wherever possible they be "attached to and function as part of ordinary schools" (p. 345).

No doubt reflecting the different cultural setting and the more restricted carrying capacity of educational institutions in the British Isles, the styles of planning and participation dicussed in this landmark report fall short of those proposed for U.S. schools. In the following respects, however, similar conclusions are drawn from the human rights base; for example, the report recommends close cooperation between parents and professionals, roles for voluntary organizations, establishment of new training programs, abolition of statutory categorization (labeling), the distinction between special and remedial services, institution of a finding and assessment process, administrative monitoring of school units several times each year, dissemination of child development information, increased nursery school education along with "playgroups" and "opportunity groups," and employment of persons to work with parents in the education of children under age 5.

The Current Challenge

The striking difference between U.S. and British or Canadian schools is that most handicapped children in the U.S. already were "mainstreamed," although often extremely inadequately, 11 when other facilities were not available. Nothing in the new statute, moreover, is a protection against giving less attention to the some 1.5 million mentally retarded children because of the high value our society, like that of Canada and of Britain, gives intelligence (Sarason & Doris, 1978, p. 21). It is conceivable, even probable, that given the values that now predominate in American society we would devote far greater resources to the 300,000 crippled and health-impaired persons, those with relatively minor learning and speech disabilities, and those among the some 500,000 visual or hearing impaired persons who already function best, than to "the least among us."

Edwin Martin, formerly, Chief of the Bureau of Education for the Handicapped, pointed out that "a whole underlying structure of assumptions" has led to our treating disabled people as we do (Martin, 1978, p. iv), that is, as if they were different kinds of human beings. Clearly, it will take another set of assumptions to move us away from conventionally restrictive, punitive, neglectful policies and practices. It would be particularly fruitful, I think, to consider two kinds of assumption: (a) that of understanding and intention and (b) that of selecting, in each case, the appropriate "social medium." John Dewey put the matter as follows in 1915:

> Beliefs and aspirations cannot be physically extracted and inserted. How then are they communicated?....
>
> The answer, in general formulation, is: By means of the action of the environment in calling out certain responses. The required beliefs cannot be hammered in; the needed attitudes cannot be plastered on. But the particular medium in which an individual exists leads him to see and feel one thing rather than another; it leads him to have certain plans in order that he may act successfully with others....(p. 11)
>
> ...the only way in which adults consciously control the kind of education which the immature get is by controlling the environment in which they act, and hence think and feel. We never educate directly, but indirectly by means of the environment. (pp. 18f.)
>
> ...The very existence of the *social medium* in which an individual lives, moves, and has his being is the standing effective agency of directing his activity. (p. 27; italics added)

In reality, the two kinds of assumption must overlap and interact. Presupposing that they are not actually separable, each is developed in turn here.

## The Major Rights Issues: What Do We Value? For Whom?

The United Nations' "Universal Declaration of the Rights of Children" lists the right to education as fundamental and inalienable. Public Law 94-124 extends the meaning of that right in the establishment of policies which few other societies could adopt today. As social conditions improve, not only may the list of assumed human rights and attendant legal and institutional rights be lengthened but the interpretations of these rights also may be expanded. Along with social security and other health and welfare policies and related educational policy, the mainstreaming concept presents one of the major expansions of a perceived "right" in this century. Having moved over the past 100 years from a privilege for the few to a privilege for many to a right for many, free public education during childhood and youth has gradually come to be imbedded in social policy as a right for all.

Our society is still moving, albeit slowly, from a haltingly enunciated ideal to a full-fledged commitment to the welfare of its children and youth, as information collected for the 1979 International Year of the Child plainly shows (Report to the President, 1980). A similar commitment to the world's children appears to lie much further down the road though it is entailed in the very concept of a fundamental human right. From a philosophical perspective, the significance of the mainstreaming movement nevertheless lies as much in its global promise as in its current national reference.

Like busing and affirmative action, most provisions for according handicapped persons a fundamental right to education are actually derivative legal or institutional rights. The IEP, planning conferences, and the like are derivative rights and not human rights as such. A. I. Melden (1977) recently emphasized that what ordinarily establishes one's claim to consideration as a human right is one's first being human, having a need to be cared for and protected, then gradually, variously, entering into personhood, coming to be a moral agent among others insofar as possible, joining in their lives, "first within the family circle and later with friends, acquaintances, and strangers" (p. 66) more and more in a mutually supportive fashion. Taken in this sense, Melden regarded the right of persons to fashion their own lives, pursue their interests, and thereby enjoy their goods (pp. 167,

185) to be the fundamental human right, and the provision of moral community to be its fundamental condition. Thus, for Melden, even the right to an education can be presumed to be for the most part a special, derivative right, except that for the young "the right to a moral education without which they cannot achieve moral agency" (p. 184) is also part of the fundamental human right. I find Melden's position relatively more sensitive to human 13 realities than many other current discussions of rights, especially those that strictly depend on a utilitarian calculus to determine moral and social values. Therefore, Melden's position is to be heartily recommended. What follows from his position is the consequence "that any person, even the most advantaged and the most powerful in the influence he exerts over others, is accountable to the lowliest and most disadvantaged for any infringement or violation of the latter's rights as a human being" (Melden, 1977, p. 194; see also p. 249), and, therefore, "special burdens [are] imposed upon the advantaged, because of the human rights which the disadvantaged have in common with them" (p. 250).

The mainstreaming concept represents the moral burdens imposed on American society--or on any society that could develop the requisite means--by virtue of the existence of handicapped individuals in its midst. That is why Public Law 94-142 is of such moment. In a strictly moral sense, handicapped children and youth always have possessed the right to an education which would enable them to develop their interests and potentials, but until recently, the right has rarely been accorded, legally or in practice. The plight of these young people and the guilt of the citizenry and its officials now stand out because in its legal garb public morality in America has come around to the commitment of means to protect the rights of these children and youth. But the achievement is not without conflict.

In the first place, the policies incorporated in education legislation are an amalgam of liberal and conservative sentiment. According to a perspicacious account by Ronald Dworkin (1978), the constitutive political morality of liberalism supposes that in providing for social equality "political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life." That of conservatism supposes that " the content of equal treatment cannot be independent of some theory about the good for man or the good of life, because treating a person as an equal means treating him as the good or truly wise person would wish to be treated" (p. 127). On this account, a hard question follows for mainstreaming decision makers, namely, what derivative policies and procedures flow from each position, and can they be conjoined? To my mind, the legislation is mercifully silent on the issue of what is "good" in more than the broadest terms, deferring treatment of that issue to the communities concerned. The irony is that as those communities fail to handle the values conflicts intelligently and well, as will inevitably occur from place to place, further legislative and judicial action will be required. Meanwhile, as in other civil rights arenas, those to whom the right has been legally accorded will have to wait until others are ready or are forced to give them their due.

In the second place, there are conflicts among a wide spectrum of operative values. The following questions--each of them both moral and legal, both educational and political--exemplify these conflicts. What mixture of public vs. private action is desirable? Is our primary aim to be that of responding to outright entitlements or must the handicapped and their advocates struggle to have their interests served? How are we to attain adequate services and equitable distribution at the same time, or can we? Shall we let the educational market determine process or shall we plan? What are we to leave to the family and what are we to provide, regardless of the family's means and interests? How are we to fulfill both the principle of freedom and the principles of justice and equality? Which of these principles overrides the others, and under what conditions?

Social decisions ordinarily, perhaps even necessarily, occur as a composite of divergent sets of values, such as those implied in the preceding questions. Usually, there are several rather than just two sets and they, in turn, reflect not only different ideologies but also different sorts of conflict within each ideology. To the degree that decision makers are in the dark or choose to ignore the values-conflicts operative among them, they are likely to falter and fail, particularly within complex social structures such as ours.

I am not supposing that we must, or even can, give a full rational account of all our choices. In his writings, Stuart Hampshire (1978) beautifully demonstrated the practically unnoticeable habits and perceptions that often enter into our ways of making moral decisions; he recognized that these features have accrued and become "internalized" over long periods, often retaining a basically conflictory character. Recently, he also rightly emphasized that "it is of the essence of moral problems that on occasion they seem hopeless, incapable of solution, leaving no right action open" (p. 40), and that for an individual there may be, in fact, no clearly coherent way out. In such cases the individual may resonably seek a trade-off, may simply choose one way over another or make some other intuitive adjustment, perhaps by some rare leap of imagination. In public decision making, however, we require reasons to be given to the degree possible and expected consequences to be specified so that we may be held accountable for our decisions and our corresponding use of power. This is why conflict awareness and resolution are so important in educational decision making. 15

What I have been leading up to is the recognition that in the establishment of an initial set of policies in Public Law 94-142 the work of moral and educational decision making has only just begun. For the most part, the lawmakers have wisely withheld laying down exactly what we must do but have opened tha way for the development of a complex community of decision makers, including the handicapped themselves. Therefore, no one can rightly interpret the full intent or extent of the law at this point. It is not so much the product of the lawmakers' deliberations which must be interpreted as it is the processes that their guidelines and the subsequent regulations entail. These processes are themselves essentially educational in form, educational with respect not only to instructional procedures but also to administrative and planning procedures.

## The Primary Social-Educational Problems: Who is Responsible? to Whom? and How?

We educators already have more to do than we can handle. There have been more starts at major education-related reform over the past 20 years than can be counted on two sets of hands and feet, and neither we nor others in the society have yet learned how to manage them all. The reason is that although funding for education has increased greatly over that period, other social and economic structures have not changed apace and the reforms are grossly inadequate responses to the needs. Nor has graduate training for educators made us into the extraordinarily skilled, knowledgeable, sensitive professionals those in our charge need us to be; nor will the change occur until the society demands it of us and shares the cost.

America has become preeminently a learning society. We have the greatest educational resources in the world; in fact, soon they may be considered our greatest resources, our greatest potential for export. Yet the understanding of educational processes that pervades our social institutions and our schools is in many respects backward compared both to our needs and to what is known about the growth processes of human beings.

Apart from the challenge of desegregation, I cannot think of any challenge that should by rights spur us to greater soul searching and reflection than this newest among our many causes. As a company of educators we shall have to become better planners, more effective collaborators, professionals more deeply knowledgeable about the developmental tasks of children and young people, and researchers far more responsive to the richness of human nature, than has been our custom. We shall have to become more cunning practitioners of the teaching art, more politically astute, more demanding on behalf of the rights of youngsters, and more firmly insistent, more gently patient with each other, than we ever have been if this new challenge is to be met. In short, we educators must give ourselves further education. We are not alone responsible, far from it; but we dare not leave our joint responsibility alone if this incredibly delicate promise is not to fall in shambles.

If these advances are lacking, within a short time mainstreaming may warrant the same criticisms that have been directed to attempts at compensatory education under the Elementary and Secondary Education Act (ESEA) of 1965, here outlined by Ornstein (1977):

> In general, compensatory education has been criticized for (1) its hasty planning and piecemeal approach; (2) mismanagement and misappropriation of funds; (3) unethical and corrupt grantsmen who justify their larceny on the basis that 'everyone does it'; (4) large consultant fees for shoddy work or for work not done at all; (5) inadequately trained personnel at the state and local level; (6) high salaries for people at the administrative levels; (7) disregard for and lack of teacher participation; (8) vague objectives; (9) poor evaluation procedures; and (10) little change in the quality or content of the programs--only increased quantity of services. Critics have characterized compensatory funding as having a reputation for scattergun approaches, and poor results. In effect, the whole ESEA movement seems to have undermined America's blind faith in education and in educators. (p. 8)

Many educators are ready; they simply have been waiting and working for the opportunity. Parents and poliiticians can expect even them to fail, however, if the necessary provisions are not made. What should the provisions be?

In their June 1978 statement, the AACTE board of directors made an appeal for the following principles to be applied to all students, not just to a neglected minority, in order to meet the Public Law 94-142 mandate (AACTE, 1978): first, equal opportunity, unlimited access to resources, unconditional acceptance of each student, and total responsiveness to individual differences; then, realization of each individual's potential, recognition of individual worth in multifaceted ways vs. strict competition, tying disabilities to tasks rather than viewing them as generic and exclusionary, and providing optimum learning environments for each and all as a shared responsibility among educators and other members of society. I agree. These elements are the very least that it will take. We should not be ashamed to enter the struggle of learning how, slowly and deliberately and creatively, just as we would at our best moments aid our students to learn. They are not likely to acquire new styles of learning and relationship, moreover, unless we do first.

Highly desirable teacher competencies for mainstreaming were ranked as follows by the 50 state directors of special education (Monaco & Chiapetta, 1978): individualized instruction, 17 comprehension of the abilities of handicapped and exceptional children,and evaluation and diagnosis of students' abilities and progress. Eight other rated competencies were seen to be "generic skills that regular classroom teachers should already possess" (and shall we add administrators as well?); they are (in rank order), provides a humanly supportive environment, uses behavioral management strategies, works cooperatively with adults in the school setting, uses the psychology of learning in instruction, evaluates usefulness of various intructional strategies, interprets task analyses, evaluates the appropriateness of resources for programmatic use, and promotes the mainstreaming concept.If this list sounds a bit dry and lifeless the priorities are nonetheless instructive. Clearly they cannot be met if classrooms and teaching schedules are overcrowded, facilities are poor, professional training and support systems are inadequate, testing and evaluation procedures are discriminatory and fail to disclose students' strengths along with their disabilities, or procedures ignore culturally diverse needs. Some of the priorities cannot be met at all by relatively untrained personnel working alone. In such circumstances, it probably would be better for the students if teachers were not asked to try.

In effect, I have been advocating the consideration of what educational processes we educators must embark upon if the good intentions of mainstreaming are to be fulfilled. I briefly define education as any process of learning conducive to human growth that involves the active participation of the learner. I do not think that we can know in advance all the elements of the new situation that may require our active learning or that we can anticipate precisely how to perform this task because we are now faced with problems of unaccustomed complexity. The point is that educators must enter upon the growth-producing process itself, wide awake to our present situation, as Maxine Greene (1978) has argued, and imaginatively seek out our appropriate "landscapes of learning," as she has enjoined us to do. The point is that educators must learn to plan by also planning to learn (Michael, 1973). Greene put the notion this way:

> We all learn to become human, as is well known, within a community of

> some kind or by means of a social medium. The more fully engaged we are, the more we can look through others' eyes, the more richly individual we become. The activities that compose learning not only engage us in our own quests for answers and for meanings; they also serve to initiate us into the communities of scholarship and (if our perspectives widen sufficiently) into the human community, in its largest and richest sense. Teachers who are alienated, passive, and unquestioning cannot make such initiations possible for those around. Nor can teachers who take the social reality surrounding them for granted and simply accede to them. Again, I am interested in trying to awaken educators to a realization that transformations are conceivable, that learning is stimulated by a sense of future possibility and by a sense of what might be. (p. 3)

A very important educational principle is involved here. Remember Mary Warnock? She published two first-rate books while chairing the British commission on special educational needs. The first explicates and celebrates the power of imagination, an amalgam of emotion and reason by which we actively envisage both what is ard what is not or might be, a sense that

> There is always more to experience, and more in what we experience than we can predict.
>
> Without some such sense, even at the quite human level of there being something which deeply absorbs our interest, human life becomes perhaps not actually futile or pointless, but experienced as if it were. It becomes, that is to say, boring. In my opinion, it is the main purpose of education to give people the opportunity of not ever being, in this sense, bored; of not ever succumbing to a feeling of futility, or to the belief that they have come to an end of what is worth having. (Warnock, 1976, p. 202f.)

Warnock placed the joyful exercise of imagination at the forefront of educational policy. I heartily concur in this notion and recommend it to all educators. If imagination is essential for students, then is it not all the more essential for teacher-learners and administrator-learners, parent-learners, and politician-learners?

Mary Warnock's other recent book is on educational policy itself. What does it mean, she asked, to claim that everyone has not only an equal right to education but a right to equal education (egalitarianism)? As an educational goal, she contended, it refers to "equality of opportunity for all children to grow" (Warnock, 1977, p. 34). Beyond that, she argued, it has never been clear what equal opportunity is opportunity for: if not for becoming alike, then for competing to receive the best education available? for the chance to get good jobs, prestige, wealth, social privileges? to acquire measured intelligence? to be happy? Warnock held that to withdraw the "ladder" concept contained in these views "may well be to remove hope" for many and is in any case "ineliminable from everyday thought about education." Yet it "cannot provide any answer to the kinds of questions which press upon policy makers. It cannot help to determine who shall be educated, for how long in what kinds of schools, or subject to what testing" (p. 47).

Warnock found fault with Rawls' now-famous principle of justice-as-fairness. Rawls suggested that the sole criterion for accepting differences of educational opportunity is whether the overall distribution is to the advantage of the less educated (e.g., whether 19 the persons educated as surgeons serve the less educated). The crucial failing in this view, Warnock indicated, lies in its failure to say anything about the justice of deciding who shall have the advantage of being educated and who shall not. For her, as for me, the determining principle is one of compassion or welfare. It is not so much a passion for equality that leads us to seek opportunities for handicapped children and youth as "a sense of outrage and of pity that any children should have to live and grow up in such hopeless situations" (Warnock, 1977, p. 54).

> For the doctrine of equality, even of positive discrimination in favour of the disadvantaged, has to be stretched to breaking point if it is to be used as the justification of educational effort and expenditure on the handicapped. But the doctrine of compassion can, obviously, justify it immediately, and without distortion. If we are humane, we will recognize a duty to improve the lot of all human beings, and particularly those who are most helpless. (p. 56)

When she turned to teaching and curriculum structure, Warnock reached the same conclusion: The principle of equality does not help us much in deciding what or how to teach or how to administer the whole process. The chief criterion for Warnock appears to be what improves life as a whole, what contributes to "the good life," notably, the attainment of virtue, moral skills, capacities to work effectively, and imagination. Again, in agreeing with her I see no ground for exempting the rest of us from what we see to be good for children. Nor need we settle once and for all on what is "good" in order to provide for it in various ways.

Something like Dewey's (1915) notion of a "social medium" is essential here. Education is a highly interactive social process. We convey what is educationally "good" chiefly through the social atmosphere and structures we provide. Children come to believe not what we say but what we do, as we do it. "Mainstreaming" is an organizing image for our thought about appropriate kinds of social medium, the means by which people interact, communicate and use things for their own ends. Dewey (1915) wrote,

> The social medium neither implants certain desires and ideals directly, nor yet merely establishes certain purely muscular habits of action, like "instinctively" winking or dodging a blow. Setting up conditions which

> stimulate certain visible and tangible ways of acting is the first step. Making the individual a sharer or partner in the associated activity so that he feels its success as his success, its failure as his failure, is the completing step. (p. 14)

This idea of Dewey indicates the two-fold concept that I wish to emphasize in closing. (a) The image of "mainstreaming itself rightly points us to an open, vigorously interactive kind of social medium where policy is responsive above all to the principle of compassion, where the search for appropriate ends and means is chiefly determined by an imaginative awareness of the needs and realities of each person involved, where imagination is also directed through the very structures of our common learning to what is not familiar, to what has not yet been conceived. (b) The handicapped themselves (adults, children, young people) must be mainstreamed into the administrative and planning process; from the outset they must become active participants in the social medium through which their perceptions, habits, and modes of thought are to be formed. I do not see any other way to accomplish the intentions of Public Law 94-142.

Who is responsible? The educators, on behalf of and with the society, and persons (e.g., parents and handicapped children and youth) who are closely involved in the learning processes that mainstreaming requires. To whom are they responsible? To the children and young people of our land, all of them, and, ultimately, to all young persons everywhere. How? By learning together, as we can.

## Conclusion

A quite minimal, even miniscule, requirement of social equality is met by letting people "in".Mainstreaming is mostly about what happens after handicapped persons get in. Policy makers at all levels, therefore, would do well not to concentrate so much on the first requirement that the second, much larger set of problems is ignored. I have emphasized them here.

Marilyn Rauth (1975) pointed out, perhaps rightly, that "most of the views about mainstreaming held by its proponents are based on philosophical and political considerations rather than hard data" (p. 8). I have no doubt that we could use much more hard data about the needs of handicapped children and young people and about what educational methods and environments might serve them best. It is also true that lawmakers and judges often misuse or fail to use scholarly findings. I am no less certain, however, (a) that the kinds of decisions contained in or implied by Public Law 94-142 rarely are or even can be derived from hard data (not least because they are often inconsistent, inadequate, or not responsive to important issues), (b) that both their substance and adequacy chiefly depend on judgments of value, and (c) that political assessments are inevitably an important feature in deciding among relevant values and giving them formal expression. Almost all the issues concerning the whys and hows of mainstreaming are necessarily both value laden and politically 21 lively.

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# Legal precedent and the individual case: how much can be generalized from court findings?

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THERE HAVE BEEN two waves of court cases concerned with special education. The first, beginning with *PARC v. Pennsylvania*, *Mills v. D.C. Board of Education*, and other well-known frontier breakers, was precedent setting in the grandest way. It led to congressional legislation and to other cases involving similar legal and factual issues. One reason for its massive impact was the courts' sweeping orders for institutional reform directed at patterns and practices of gross educational discrimination against handicapped children. The second, more recent, wave of cases is less apt to set such dramatic precedents; it is characterized by finely honed, narrowly drawn decisions and orders that do not generalize nearly so widely as the earlier cases. Nonetheless, generalizations will be cautiously drawn. The question posed in this issue—Are the limits of the educa-

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tional system being pushed too far?—requires a hesitant no.

Generalizing beyond what a court has found in a particular case is a risky business at best. Each case rests on particular and unique facts. Comparing only the results of particular decisions without clearly distinguishing them on the basis of their factual differences is like comparing fast food to cordon bleu. Both may be edible, but beyond that their differences soon outweigh their similarities. Facts from case to case may be comparable, but nevertheless the cases are essentially unique. What *might* be generalized from a case is not facts but a legal rule or set of rules. Whether these principles are applied in subsequent cases depends on the unique and particular facts involved, the current state of the law, and the way courts view the facts and the law in combination. The legal system may depend on precedent, but the existence of a legal principle based on precedent is formed over time and does not emerge full-grown from a single case, at least under ordinary circumstances. When individual cases begin to form a pattern, there may develop a trend in the decisions.

Two major waves of cases characterize special education litigation. Those in the first wave were decided either by consent agreements (agreements reached by the parties and approved by the court) or under Fifth or Fourteenth Amendment constitutional principles. The cases in the second wave were decided under federal statutes as well as (in some instances) constitutional principles. The cases reviewed throughout are selected ones; no attempt is made to review all relevant cases.

## THE FIRST WAVE

The first-wave cases were class-action suits brought and decided mostly on constitutional grounds. They successfully attacked patterns of conduct that went to the very heart of education: exclusion from educational opportunity (*PARC, Mills, and LeBanks v. Spears)* and improper educational assessment and placement *(Larry P. v. Riles)*. Further, each case graphically demonstrated that schools and their officials are not immune from judicial examination; each brought the conduct of schools, ordinarily a matter of state and local control, under significant judicial oversight and control. Each set precedent for other cases, and each helped to lay the groundwork for later federal legislation. It is beyond argument that these first-wave cases were precedent-making in the broadest sense; generalizations from them, and based on them, were both easy and correct to make in other early cases. A summary of the first-wave cases follows:

- *PARC v. Pennsylvania* (1972)[1] established the right of all retarded students, however seriously impaired, to a free, appropriate public education; to procedural safeguards in educational placement; and to child find (annual census). All handicapped children can learn and therefore, according to this decision, they may not be excluded from public education. The preference was set for "least restrictive" placement.
- *Mills v. D.C. Board of Education* (1972)[2] established the right of all handicapped children to free, appro-

priate education; to procedural safeguards in educational placement; to child find; and to periodic review of special educational placement.

- *LeBanks v. Spears* (1973)[3] established procedural safeguards in educational placement; nondiscriminatory educational evaluation; periodic review of special educational placement; the preference for "least restrictive" placement; and the right to an educational plan for each child.
- *Larry P. v. Riles* (1972)[4] mandated nondiscriminatory, multifaceted, interdisciplinary educational evaluation.

## THE SECOND WAVE

The second-wave cases have all been decided since the enactment of both Section 504 of the Rehabilitation Act of 1973, which mandates nondiscrimination on basis of handicap, and the Education for All Handicapped Children Act of 1975 (PL 94-142). These statutes and their implementing regulations establish six principles for the education of handicapped children: zero reject; nondiscriminatory evaluation; appropriate education; least restrictive placement; procedural due process; and parent participation. Each of these principles derives directly from the first-wave cases; this, among other things, is what made those cases precedent setting. In contrast with the first-wave cases, the later cases were decided under either or both of the 1973 and 1975 statutes; some were decided in part according to constitutional principles as well; and none were based either on consent agreements or on exclusively constitutional grounds. Further, although some of the second-wave cases are class actions, others involve a single plaintiff or set of plaintiffs limited in both number and legal interest.

This suggests that the class action suit, although still important, may no longer be the dominant vehicle for questioning school practices. Indeed, as individuals, not classes, turn to the courts for relief, judicial decisions and orders are based increasingly on statutory as well as constitutional grounds, and relief is tailored to specific individuals or to limited groups having highly similar needs and circumstances. Generalizing from the newer decisions thus becomes both hazardous and ill-advised. As litigation focuses increasingly on more narrow issues, the results in particular cases also become more unpredictable. Unlike the first-wave decisions, those in more recent cases sometimes contrast with each other rather sharply. The issues are more complex, and lack of widespread unanimity in decisions, except on a few points, reflects this increasing complexity and makes it unsafe to hypothesize a broad consensus.

Nevertheless, the more recent cases continue to illustrate the role of federal courts in regulating public schools and their officials. The rulings indicate that the courts want to avoid the day-to-day management of schools; perhaps they still retain the traditional view that public schools are essentially a matter of state and local concern. So long as special education is regulated by federal law, however, it will be difficult for the courts to avoid regulating schools. The question

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for the future is not whether but how deeply federal courts will be involved in the schools.

In *New Mexico Ass'n for Retarded Citizens v. State of New Mexico*[5] (1874), a class action suit, the plaintiffs successfully argued that they were not receiving a free, appropriate education in violation of Section 504 of the Rehabilitation Act. The court ordered the state to provide them with a free, appropriate public education as defined by the regulations promulgated under Section 504. It also awarded attorneys' fees and costs to the plaintiffs and ordered the defendants to submit a plan for achieving the requirements of the injunction.

If not reversed or modified on appeal, this decision will be important. It holds that Section 504 requires the state and the local school districts to provide a free, appropriate public education to handicapped students even though they decline PL 94-142 aid but accept other federal education aid. Thus, if Reagan administration plans for educational block grants materialize and PL 94-142 aid in its present formula-grant form is eliminated, Section 504 will continue to preserve handicapped children's rights in essentially their present form, since the Section 504 and PL 94-142 regulations are substantially similar. This statement assumes Section 504 regulations will not be changed. This is an arguable assumption since the Reagan administration has targeted these regulations for extinction.

This decision is also important for its holding that, under Section 504, the plaintiffs are not required to prove that the discrimination against them was intentional. Instead the court considered only the *effects* of the alleged discrimination. For this reason a violation of Section 504 may be easier to demonstrate than a violation of the Fourteenth Amendment, where "intent" to discriminate is required.[6] If further courts ultimately decide, however, that the intent of conduct must be shown as well as the effect, Section 504 as a legal weapon of choice gives plaintiffs no particular advantage.

Another series of cases[7] has involved the expulsion of handicapped children because of disciplinary or other nonacademic-related reasons. These cases speak with unanimity: The child is entitled to (a) prior notice that the school proposes to expel him or her; (b) a due-process hearing in conformity with PL 94-142 and Section 504 regulations; (c) continued placement in an appropriate school program that is within one or more steps of a continuum of "least restrictive" placements; (d) placement in the status quo program pending regulation of the due process hearing; (e) a determination of his or her special education needs and a decision on his or her new placement made by professional staff but not the local school board; and (f) a comprehensive evaluation to determine, among other things, whether the child's disruptive behavior is caused by the handicap and thus what an appropriate least restrictive program and placement should be. Only one of the four cases was a class-action lawsuit. Constitutional claims were involved in all of the cases, but each was decided principally on federal statutory grounds (PL 94-142 and Section 504).

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Under the rulings in these four cases, it is apparent that expulsion of handicapped students is strictly regulated; expulsion is treated as a change of placement prohibited by federal law. The cases suggest that special education procedures in conformity with federal law must be observed, rather than traditional expulsion procedures. This is a point on which several lower federal courts have apparently reached a basic consensus that is highly generalizable from individual cases.

Different generalization results obtain when exclusion, not expulsion, from a school-related activity is involved, at least when the handicapped child's participation presents a serious danger to the child. In *Kampmeier v. Nyquist*[8] two junior high school students, each of whom had sight in only one eye, unsuccessfully challenged their school's refusal to let them participate in contact sports because of a high risk of injury. The court found that the students had presented little evidence, whether medical, statistical, or otherwise, to overcome the school's rationale.

Contrary to *Kampmeier v. Nyquist*, in *Poole v. South Plainfield Board of Education*[9] the court upheld the right of a student born with one kidney to participate in an interscholastic wrestling program. Noting that the purpose of Section 504 is to permit handicapped individuals to live life as fully as they are able, the court found that the school had a duty to alert the student and his parents to the dangers involved and to require them to deal with the matter rationally. This duty was satisfied once it became clear that the family knew of the dangers and rationally reached a decision based on the opinions of physicians and sports experts. Because of the procedural posture of the case—decision on defendant's motion for summary judgment before trial—the court did not find that the student had proven a violation of Section 504. Its precedential value thus is limited by this fact. The different results reached in *Kampmeier* nevertheless clearly demonstrate the difficulty of generalizing from a particular decision as well as the difficulty of predicting outcomes of particular cases. When factual differences exist, different results will obtain.

***Different generalization results obtain when exclusion, not expulsion, from a school-related activity is involved, at least when the handicapped child's participation presents a serious danger to the child.***

Three recent residential placement cases (none are class-action suits and all were decided on PL 94-142 grounds) required federal trial courts to deal with uniquely individual problems of handicapped students. All reached the same verdict: School systems have the responsibility under federal and state statutes for paying for residential programs for multiply handicapped children. Judicial reliance on institutions calls into question the rule and meaning of the principle of least restrictive placement.[10] It would be incorrect to generalize from these rulings that a similar result would obtain if the child were, for example, less severely involved or able to be appropriately served by a nonresidential school program. Happily, though, the rulings do provide guidance and consistency within the boundaries of their similar fact situations.

The 12-month school cases also illustrate the thesis that the second-wave cases are valuable as precedents—and generalize for the guidance of educators and their counsel—only insofar as the dispositive facts are concerned. In ***Armstrong v. Kline***,[11] a class-action suit, counsel for severely and profoundly retarded and severely emotionally disturbed children successfully argued that the refusal of state and local agencies to provide education beyond the 180 days of the typical school year violated the children's rights to an appropriate education under PL 94-142. Breaks in educational programming, resulting from the 180-day rule, caused them to have severe learning difficulties, regression, and loss of skills. The state argued that any regression was merely coincidental and that the lost skills resulted from the nonfunctional nature of the skills being taught, from teacher incompetence, and from parental failure to have the children practice the skills. The trial court rejected these arguments but made it clear that it could not find that all children in these categories inevitably regressed.

The court was convinced that Congress recognized that attaining self-sufficiency is a goal of an appropriate education and that Congress had sought to secure it by enacting PL 94-142. Applying the self-sufficiency standard, the court held that reliance on the 180-day rule had violated the plaintiffs' rights to an appropriate education.

On appeal, however, the Court of Appeals declined to interpret the act as providing a particular educational goal, such as self-sufficiency, for an appropriate education. Instead it said that the act allows the states in the first instance to set individual educational goals and reasonable means to attain those goals. The 180-day rule, however, was illegally inflexible and incompatible with the act's emphasis on individual programming; reasonable educational standards set by the states must allow for individual consideration of each handicapped child. The appellate decision makes it clear that the states have the initial power to define educational goals and the elements of an appropriate education. Although the state judgment that was set out in the 180-day inflexible rule was not upheld, the decision suggests that courts will pay increased deference to state-level judgments, at least initially and within limits.

In *Rowley v. Board of Ed. of Hendrick Hudson Cent. S.D.*,[12] the issue was whether a refusal to provide a deaf grade school student with sign language interpreter services deprived her of an appropriate education. To resolve the issue, the court adopted the following standard for deciding what constitutes an appropriate education under PL 94-142: that each handicapped child be given an opportunity to achieve his or her full potential commensurate with the opportunity provided to other children. Under this test the handicapped child's potential must be measured and compared to her performance, and the resulting differential compared to the differential experienced by nonhandicapped children.

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To meet the standard, the defendants relied on measurements of the student's academic performance and descriptions of her behavior (results of two achievement tests and one IQ test and school records showing that the student was performing above the median of her class). Although this evidence showed that the student was a bright, well-adjusted child who had enjoyed good rapport with all of her teachers and was able to respond to their instruction, it proved little more than an *adequate* education, a standard the court had rejected. In addition, the school principal testified that only the student's academic failure would convince the school district that the student needed interpreter services. The court characterized this as an erroneous understanding of the law: The defendants had failed to compare the student's performance to the performance of nonhandicapped students of similar intellectual caliber and comparable energy and initiative. Indeed, the court found it likely that much of the student's energy and eagerness had gone into compensating for her handicap; if this need for compensation had been eliminated (by provision of interpreter services), her energy could have been directed toward greater excellence in classroom performance.

The plaintiff's evidence showed that she was capable of discriminating much less than all of what was said in class. From this the court inferred that she was understanding much less than all of her instruction. Since understanding was impossible without the ability to discriminate speech, the student's deficiency in understanding supported the conclusion that her educational shortfall was greater than that of her peers. The court pointed out that although no child understands all of what is taught in a class, the failures of other children are not the result of handicaps but instead result from lack of interest, energy, or intellectual potential. By contrast, the plaintiff's lack of understanding was inherent in her handicap; this is precisely the type of deficiency that was addressed in PL 94-142 in requiring that every handicapped child be given an appropriate education, including (in this case) interpreter services.

Although *Rowley* was affirmed on appeal, the Court of Appeals emphasized the unique nature of the evidence in the case, the narrow scope of its holding, and that its decision was not intended as authority beyond the case itself. Whether other federal courts might follow the lower court's standard for an appropriate education remains to be seen.

Even after *Rowley* and *Armstrong*, it is extremely difficult to predict what "appropriate education" will be interpreted to mean. Generalization from these decisions, taken together, seems precarious; they both reach favorable results for the students, but beyond that they do not, in the aggregate, generalize easily except in their emphasis of the requirement of individualized education programming. The 180-day rule fell because of its inconsistency with that requirement, and interpreter services were required (consistent with the equivalency rule of the 504 regulations) because they were necessary for a certain individual to be given educational opportunities comparable to those given nonhandicapped children. These results obtained, however, only when the evidence was sufficient to show that the requirement of individualized education was not being met by the schools.

It is indisputable that courts will continue to decide cases involving the claims of individual students as well as classes of students. How much will their decisions generalize? What guidance will they give educators? What precedential effects will they have on other courts?

If cases are predicated on constitutional grounds alone or primarily, their results tend to generalize widely. This is so because cases of this nature involve multiple allegations of constitutional violations; widespread relief is sought; and the sparse and flexible language of the Constitution is applied in such a way that it gives other plaintiffs and courts precedents to follow in future cases. *Mills*, *LeBanks*, and *Larry P.* illustrate this point.

Cases that are class-action based also tend to generalize well. This is so because by definition a class action involves multiple plaintiffs, similarly aggrieved, relying on common legal grounds and enjoying the benefits of initially uniform judicial relief. *PARC*, *Mills*, and *Larry P.* prove this much. Whether classification suits set precedents is another matter (and another type of generalization).

The trend of the cases—the second-wave lawsuits—is neither constitutionally oriented nor class-action based, however. Instead, relying on Section 504 or PL 94-142, or both, and in some instances, on constitutional and state-law grounds as well, plaintiffs are seeking specific and unique relief: specific to them alone and unique because of their individual educational needs. As indicated previously, the results of those one-shot cases will not generalize so widely as those of the first-wave cases, at least at the outset. There are several reasons why this will be so. The cases are highly individualized in the nature of the claims and relief sought. The courts will try to decide cases on statutory grounds (applying Section 504 and PL 94-142 or state statutes) before resorting to constitutional principles to resolve the issues. There appear to be fewer clearly unacceptable patterns and practices of educational discrimination, or at least fewer reaching the courts. Universal compliance does not exist, however, and probably never will. *N. Mexico ARC* also shows that egregious violations, of a fairly recent nature, still persist.

Nevertheless, as the situation-specific, non-class-action lawsuits accumulate, there will be greater ability to generalize: The "common law" of special education and the inductive logical processes of the law will be put to use in these areas of dispute just as they always have in other areas. Cases of similar importance will be filed in reliance on other successful lawsuits. Factual similarities or analogies will be drawn, and the situations in the previously cited cases will be seen to be more alike than different in some cases, more different than alike in others. This will be because the dispositive facts of those cases—the kernels from which the holdings, orders, and principles are inseparable—either will be indistinguishable or will be seen to be differences that indeed do make distinctions and thus call for different results.

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At this writing, while Congress debates the emasculating proposals of the Reagan administration, it is also clear that special education law (S-1103, the Education Consolidation and Block Grant Bill), is nascent but active. Its bedrock principles—zero reject, nondiscriminatory evaluation, appropriate individualized education, least restrictive appropriate placement, and due process—are solid. Their yield for handicapped students will be great.

Does this mean that the law is pushing the limits of the educational system too hard, just hard enough, or not hard enough? That depends on one's point of view, one's perspective on limits: Are they immutable? I think not, and I conclude that the law is not pushing intolerably at the system's limits. But this conclusion is reached with caution. The plaintiff-responsive bar must always be careful to select likely winners if they are willing to litigate to the highest appellate level. The Realpolitik of educational systems and their relatively inpermeable and intransigent nature make change by coercion—by court order—difficult to achieve. The available levels of financial resources are, always have been, and always will be less than desirable. Indeed, Reaganism's fondness for block grants, educational vouchers, and tuition tax credits seriously jeopardizes the already thin federal financial presence in special education. Special education preservice and in-service training is in an elastic state. Demands exceed capacities; teacher burnout exacerbates the problem; insufficient deployment of special education personnel is a major problem; and the commitment of some educators, Congress, and the Supreme Court itself to the cause of handicapped citizens is doubtful.

***The Realpolitik of educational systems and their relatively impermeable and intransigent nature make change by coercion–by court order–difficult to achieve.***

Nonetheless, in the 7 years since Section 504 was enacted, the 5 since its regulations became effective, and the 6 since PL 94-142 was made law, special education progress in public schools has been remarkable, school systems have demonstrated the plasticity of their limits, a fragile consensus about the inherent rightness of special education claims by handicapped children has emerged, and preservice and in-service training have been responsive. All of this leads to the cautious conclusion that the law is not pushing too hard at the limits of the educational system; if anything, it is showing how vast those limits may be by requiring and enabling them to expand.

FOOTNOTES

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1. 334 F.Supp. 1257 (E.D. Pa. 1971) and 343 F.Supp. 297 (E.D. Pa. 1972).
2. 348 F.Supp. 866 (D.D.C. 1971).
3. 60 F.R.D. 135 (E.D. La. 1973).
4. 343 F.Supp. 1306 (N.D. Ca. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974). In 1979 the court

decided the merits of plaintiffs' claims after a trial and granted permanent injunctive relief. It enjoined the defendants from using, permitting the use of, or approving the use of any standardized intelligence tests for identifying black educable mentally retarded (EMR) children or placing them in EMR classes without prior court approval. It ordered the defendants to monitor the schools and eliminate disproportionate placement of black children in California's EMR classes. *See Larry P. v. Riles*, 495 F.Supp. 926 (N.D. Ca. 1979). Compare, however, the decision in *Parents in Action on Special Education v. Hannon*, _____ F.Supp. _____ (N.D. Ill. 1980), 49 U.S.L.W. 2087, in which the claim of racial bias in intelligence testing was unsuccessful. Although the court found several test items to be sufficiently suspect that their use was inappropriate, the impact of missing any particular question was reduced since the IQ score was not the sole determinant for placing a child in an EMR class.

5. 495 F.Supp. 391 (D.N. Mex. 1980).
6. Under the Fourteenth Amendment, a plaintiff apparently has to show that the challenged action has a disparate adverse effect on minorities and that the actor intended to discriminate. See *Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976). The outcome of a case pending before the Supreme Court, for example, may be important to those relying on Section 504 for their claims, because several issues involving the way Section 504 is to be interpreted are involved in *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980), review granted by the Supreme Court 11/03/80, 49 U.S.L.W. 3322.
7. *Howard S. v. Friendswood*, 454 F.Supp. 635 (S.D. Tex. 1978); *Stuart v. Nappi*, 443 F.Supp. 1235 (D.Conn. 1978); *Doe v. Kroger*, 480 F. Supp. 225 (N.D. Ind. 1979); and *S-1 v. Turlington*, No. 78-8020-CIV-CA-WPB, S.D. Fla., filed June 15, 1980, *aff'd* 49 U.S.L.W 2504 (Feb. 10, 1981) OCR concurs, In Re Austin Ind. Sch. Dist., No. 067-91572 (OCR-HEW, Aug. 1980).
8. 553 F.2d 296 (2d Cir. 1977).
9. 490 F.Supp. 948 (D.N.J. 1980).
10. *Matthews v. Campbell*, _____ F.Supp. _____ (D.Va. 1979); *Kruelle v. Biggs*, 489 F.Supp. 169 (D. Del. 1980); and *North v. D.C. Bd. of Ed.*, 471 F.Supp. 136 (D.D.C. 1979).
11. 476 F. Supp. 583 (E.D. Pa. 1979), *aff'd in part, and remanded*, *Battle v. Pennsylvania*, _____ F.2d _____ (3rd Cir. 1980), 49 U.S.L.W. 2105 (8/12/80). *Concur*, *Fetzer v. Mandan Public School Dist.*, No. A1-80-40 (D.N.D., Oct. 17, 1980).
12. 483 F.Supp. 528 (S.D.N.Y. 1980), *aff'd.*, _____ F.2d _____ (2nd Cir. 1980), 49 U.S.L.W. 2121 (8/19/80). *Concur*, *Springdale School District v. Grace*, 494 F.Supp. 266 (W.D. Ark. 1980).

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# 3

# *Larry P.* and *PASE*: Judicial Report Cards on the Validity of Individual Intelligence Tests

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## INTRODUCTION

During the school year 1979-1980 federal district courts in California and Illinois rendered two significant decisions concerning challenges by black school children to the validity and cultural fairness of standardized, individually administered intelligence tests. In analysis, style, reasoning, and outcome these two decisions—*Larry P. v. Riles* (1979) and *PASE v. Hannon* (1980)—are diametrically opposed. Nevertheless, both will very likely have a substantial impact on the functioning of school psychologists generally and assessment practices particularly. This chapter attempts a comprehensive description and critique of the two cases and some hypotheses about their effect on the profession of school psychology.

## HISTORICAL AND LEGAL CONTEXTS

It was the Chinese, over 3000 years ago, not the Americans in this century, who first used large-scale psychological testing (Dubois, 1966). But, as with many other technological developments, it was the United States that enthusiastically adopted the method. By now it is highly probable that every person in our country has been affected in some way by the administration of tests. Testing has become the means by which major decisions about people's lives are made in industry, hospitals, mental health clinics, the military, and, most pertinent here, the public schools. It has been estimated that more than 250 million standardized tests of academic ability, perceptual and motor skills, emotional and social

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characteristics, and vocational interests and talent are used annually in education (Brim, Glass, Neulinger, Firestone & Lerner, 1969; Holmen & Docter, 1972).

Tests themselves, by and large, are facially neutral. They do not inherently discriminate against those who take them and, undoubtedly, scores derived from tests have been used to admit, advance, and employ. For most people, however, test results have served as exclusionary mechanisms—to segregate, institutionalize, track, and deny access to desired goals. Tests are used in conjunction with almost every major educational practice: screening, placement, program planning, program evaluation, and assessment of individual progress. But because tests have been used also to exclude and segregate they are alleged, to have undermined "the American public school ideal promoted by educational reformers in the last century, whereby the school would serve as an object lesson in equality and brotherhood by drawing students from every social, economic and cultural background into the close association of the classroom (Sorgen, 1973, [p. 1137])."

Although criticism of testing from social, political, and psychological commentators spans six decades, only in the last fifteen years have legal scholars begun to examine its use (e.g., Bersoff, 1979; Kirp, 1973; McClung, 1977; Shea, 1977; Sorgen, 1973; Yudof, 1973). Two trends may explain this rather current interest. First, there has been increased judicial scrutiny of educational practices, and second, psychological and educational tests have been seen as tools of discrimination, denying full realization of the constitutional rights of racial and ethnic minorities. As a result, since the mid-1960s there has been much litigation and legislation affecting the administration, interpretation, and use of psychological tests.

## Judicial Scrutiny of the Public Schools

The use of tests to identify, evaluate, and place children is a time-honored educational function authorized by school boards and performed by school personnel. "A threshold issue is whether courts should involve themselves in [such] matters at all (Note, 1973, [p. 1225])." There was a time when the behavior of school officials went virtually unexamined by the legal system. Courts, pleading lack of expert knowledge, were wary of interfering in the discretion of administrators to educate their students. But although the 1954 landmark desegregation decision, *Brown v. Bd. of Educ.* (1954) "significantly altered this allocation of authority, [it did so] only where issues of race were concerned . . . (Kirp, 1977, [p. 118])." A decade ago the Supreme Court was still warning that "judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . (*Epperson v. Arkansas*, [1968]) (p. 104)."

However, the past dozen years have seen a marked increase in judicial involvement in schools. Educators' total immunity from close examination by the courts may be said to have ended with the Supreme Court's 1969 declaration (*Tinker v. Des Moines Ind. Comm. Sch. Dist.*, [1969]) (p. 511) that "students in school as well as out of school are 'persons' under our Constitution . . . possessed of fundamental rights which the State must respect." Since then the Supreme Court has decided such issues as the reach of compulsory education laws, the requirements of due process prior to the infliction of disciplinary sanctions, the immunity of school officials from money damage liability for violations of students' civil rights, the education of nonEnglish speaking children, the legality of special admissions programs for minorities, the obligation of postsecondary institutions to admit handicapped students, and the validity of system-wide remedies to reduce school segregation.

Nevertheless, the significant victories that students won in the mid-1970s appear to have ended. In the past four terms the Supreme Court has reemphasized the importance of judicial restraint and reiterated its support for the discretion of school personnel to make important decisions that affect students' lives. Finding that schools were not within the ambit of the eighth amendment's ban on cruel and unusual punishment, the Court in 1977 refused to bar corporal punishment or to require a hearing prior to its imposition. Justice Powell, speaking for a slim majority, noted that it was reviewing a "legislative judgment, rooted in history and reaffirmed in the laws of many States" and upheld the right of school officials to administer physical discipline "reasonably." In *Board of Curators of the Univ. of Mo. v. Horowitz* (1978), the Court held that no hearing was necessary prior to the dismissal of a medical student completing her fourth year of training, even though three years prior to that in *Goss v. Lopez* (1975) it concluded that even a one-day suspension of high school students compelled some sort of informal give-and-take between the disciplinarian and alleged offenders before they could be sent home. It distinguished the two cases in the following manner:

> The decision to dismiss [Ms. Horowitz] . . . rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately. . . . Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. . . . The determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.
>
> . . . We decline to further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship. We recognize, as did the Massachusetts Supreme Judicial Court over 60 years ago, that a hearing may be "useless or even harmful in finding the truth as to scholarship" [pp. 89-90].

*Horowitz*, then, may have some important implications for the use of psychological tests. If employed for academic purposes, as almost all tests are,

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courts may be diffident about scrutinizing their use. *Horowitz* emphasizes the need for unfettered "expert evaluation of cumulative information (p. 90)." To a lesser degree, *Regents of the Univ. of Calif. v. Bakke* (1978) (the so-called reverse discrimination case) also stands for judicial restraint. *Bakke* permits unencumbered individualized decisionmaking so long as impermissible racial or ethnic considerations are not part of the decision. It is just these purposes for which tests have been deemed useful—case-by-case appraisals of educational deficits and instructional needs performed by designated professionals based on assembled data. Nevertheless, while certain tests may eventually pass legal examination, there is little doubt that courts are no longer inhibited about closely analyzing their psychomatic properties, their interpretation and their application.

## The Implication of Tests in the Attempt to Forestall Desegregation

The Supreme Court's ringing declarations in *Brown v. Bd. of Educ.*, (1954) that "segregation is a denial of . . . equal protection," that public education "must be made available to all on equal terms," and that to separate black children from white "solely because of their race generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone (pp. 493-494)" began the process of desegregation in the South. But, the course of remedying decades of de jure separation was slow and deliberate and many states attempted to forestall the process by implementing innovative mechanisms that would preclude black children from attending previously all-white schools. One of those mechanisms was the Pupil Placement Acts, which relied heavily on the use of intelligence and achievement tests to accomplish their purpose.

The pupil placement laws prescribed criteria by which local school boards would make decisions about students who wanted intradistrict transfers from their assigned schools to ones to which they preferred to go. In reality, they served to screen black applicants who wanted to attend the newly desegregated "white" schools. Among such apparently innocuous criteria as the availability of space and transportation were scholastic aptitude, intellectual ability, and the effect of admission upon prevailing academic standards at the prospective school. When Alabama's School Placement Act was held constitutional on its face by a three-judge federal court (asserting that the law "furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to race or color"), and its opinion affirmed by the Supreme Court in *Shuttlesworth v. Birmingham Bd. of Educ.*, (1958), school systems received the imprimatur to assess intelligence and achievement in scrutinizing transfer applications of black students.

The Acts were sustained as expressions of state sovereignty by which individual states could experiment with the difficult task of achieving gradual and well-regulated integration. The criteria were judged to be valid and the use of tests was uniformly upheld. The plaintiffs never challenged the validity of the tests, nor did the courts ever examine them in that regard. Tests were prohibited only when the courts found that they were administered solely to black children who wanted to attend "white" schools and were thus employed as overt attempts to avoid desegregation. Occasionally a court would lose patience as it was forced time and again to review another scheme that some inventive school board would create:

> [T]he District has . . . made its processes of application of the statute consist in having applicants for transfer subjected to such devices as the California Mental Maturity Test, the Iowa Silent Reading Test, the Otis Quick Scoring Test of Mental Ability, the California Language Test, the Bell Admustment Inventory, and other such things—which, at least in the elementary area of public education, are new adornments upon the entrance doors to school houses and classrooms.
>
> [I]n what the District has done and proposes to continue doing, application of these devices is not going to be made to the students generally of the system but only to such individuals as undertake to engage in application for a transfer—which in the realities of the District here . . . simply means, to Negro students seeking to enter a white school. (*Dove v. Parham*, 1960, p. 280).

But in the main courts acted gingerly in these early cases. "[M]ost federal courts were careful to delve into matters of school policy only after drawing the parameters of their inquiry to avoid any encroachment upon the school boards' discretionary authority (Note, 1973, [p. 1036])." They made it clear that their function was not to make educational policy, resolve conflicts in educational theory, or declare tests unfair or unacceptable as a matter of law. It was only when "educational principles and theories serve[d] to justify [the preservation of] an existing system of imposed segregation (*Dove v. Parham*, 1960, [p. 258])," that testing programs were enjoined as barriers to the vindication of the constitutional rights secured in *Brown*. Test administration that applied to everyone and that led to regrouping among and within schools was, in the first decade after *Brown*, free from judicial scrutiny. In the early 1960s, when the courts were attempting simply to begin the process of desegregation, charges that tests themselves were racist, culturally biased, and discriminatory were not yet heard.

There is simply not the space here to describe fully how school systems and experts in educational measurement attempted to use data gleaned from individual and group psychological tests to take advantage of the confusion that abounded from 1955 to 1965 as to the reach and meaning of the Supreme Court's decision in *Brown*. (For a full exposition of this matter see Bersoff, 1979.) It is sufficient to indicate that a variety of southern school systems sought to prove that differences in learning rates, cognitive ability, behavioral traits, and capacity for education in general were so great between black and white children that it

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was impossible for all of them to be educated effectively in the same room. The contention in *Stell v. Savannah-Chatham County Bd. of Educ.*, 1963, [p. 668] was that "to congregate children of such diverse traits in schools . . . would seriously impair the educational opportunities of both white and Negro and cause them grave psychological harm."

Almost without exception, the test results that led expert witnesses (psychologists prime among them) to conclude that black children were genetically inferior, and the tests on which those conclusions were based, went unchallenged by attorneys fighting to enforce desegregation. They argued only that such evidence and the conclusions drawn therefrom were immaterial and irrelevant. States, now educated by decisions in the first decade after *Brown*, repealed or drastically altered the pupil placement acts, and school systems cautiously tested all children. As long as race was not the evident criterion on which decisions were made, judicial restraint and support for school system discretion continued. The inexorable conclusion from these cases was that testing to measure academic ability was perfectly permissible.

## Early Litigation

It was not until 1967 that a federal court directly confronted the change that psychological tests were inherently biased against minorities. The case *Hobson v. Hansen* (1967) was heralded as the most far-reaching decision affecting school classification. Some writers predicted that it would radically alter the administration of urban education (e.g., Sorgen, 1973; Note, 1968). The case ostensibly concerned the constitutionality of disparities in the allocation of financial and educational resources in the Washington, D.C. public school system that, it was claimed, favored white children. The central issue, however, was the constitutionality of placement, through standardized tests, of an overrepresentation of black children in lower (EMR) academic tracks and white children in upper (college bound) tracks.

Despite the fact that the District of Columbia had instituted ability grouping in a genuine attempt to remedy severe academic deficiencies of black children, the court ultimately condemned the system because it found significant racial disproportionality among the groups. Although the stated criteria for entrance into any one of the tracks included teacher and counselor evaluation of maturity, stability, physical condition, and grades, the court concluded that "the proper operation of the track system practically demands reliance on test scores (*Hobson v. Hansen*, 1967, [p. 475])." Thus, it was disproportional placement in programs that were found to have a negative impact on black children, determined primarily by reliance on standardized tests that triggered the court's intensive inquiry into the nature and limitations of standardized tests.

The court decided that classification on the basis of ability could be defended only if such judgments were based on measures that assessed children's capacity to learn, i.e., their innate endowment, not their present skill levels. The court concluded that the assessment devices upon which the classifications depended did not accurately reflect students' learning ability. The inevitable result was that ability grouping and the group tests relied upon to make tracking decisions were ruled unconstitutional. The words the court used to condemn the school system's practices were to have a profound effect on the use of psychological tests during the next decade:

> The evidence shows that the method by which track assignments are made depends essentially on standardized aptitude tests which, although given on a system-wide basis, are completely inappropriate for use with a large segment of the student body. Because these tests are standardized primarily on and are relevant to a white middle class group of students, they produce inaccurate and misleading test scores when given to lower class and Negro students. . . . [T]hese students are in reality being classified . . . [on] factors which have nothing to do with innate ability (*Hobson v. Hansen*, 1967, [p. 514]).

The abolition of ability grouping and the condemnation of group testing in Washington, D.C. stimulated a round of post-*Hobson* cases throughout the country. In many southern school systems during the early 1970s, any kind of ability or achievement testing for pupil assignment purposes was banned until unitary school systems were established. In the Southwest there was another group of cases with two new significant dimensions. First, the plaintiffs were Hispanics, rather than blacks. Second, the focus of the attack was not group tests, but individually-administered instruments. One of the noteworthy findings in *Hobson* was that reliance on group measures contributed to the misclassification of approximately 820 of 1272 students. When clinicians reassessed the children in the EMR track they found that almost two-thirds were not genuinely retarded. In this light, *Hobson* could be seen as a vindication of the use of individual tests by school psychologists. But, despite *Hobson*'s implicit approval of individual testing, the cases brought by Mexican-American plaintiffs began to attack the stately, revered, and venerated devices against which all other tests were measured—the individual intelligence scales such as the Stanford-Binet and the Wechsler Intelligence Scale for Children (WISC). The most important trio of cases, *Covarrubias v. San Diego Unified Sch. Dist.* (1971), *Guadalupe Organization, Inc. v. Tempe Sch. No. 3* (1971), and *Diana v. State Bd. of Educ.* (1970) were all settled out of court by consent decree, but each had an important effect on school testing practices. As a result of *Diana*, for example, California changed its education code to insure that children would be tested in their most fluent language, that required evaluations by certified school psychologists would be contingent on parental approval, and decisions concerning placement in EMR programs could be made only after multifaceted evaluations including educational assessment, developmental history, and adaptive behavior scales, as well as intelligence tests. 106

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*Hobson*, therefore, did have, as the commentators predicted, a considerable effect on educational practices. With one blow the court's decision severely wounded two sacred cows—ability grouping and standardized testing. *Hobson*, when read in its entirety, represents the justified condemnation of rigid, poorly conceived classification practices which negatively affect the educational opportunities of minority children. The court's major concern was not the test but the school system's inflexible ability grouping practices which stigmatized blacks and failed to provide them sufficient resources. In effect, students in EMR programs were relegated to permanent inequality. As we will see, it was those same concerns which led to both *Larry P.* and *PASE*. But, while tests were not the focus of the concern, swept within Hobson's condemnation of harmful classification practices were ability tests used as sole or primary decisionmaking devices to justify placement.

Because of *Hobson*'s effect on future testing litigation, it may be worthwhile to scrutinize the court's condemnation of psychological testing, not questioning the ultimate decision and its remedies, but evaluating it from a psychometric perspective. Perhaps the court's most serious mistake was its insistence that grouping could only be based on tests that measure innate ability. No psychologist who has written on the subject, including Jensen (1969, 1980) believes that tests measure hereditary endowment solely (e.g., Anastasi, 1976; Cancro, 1971; Cleary, Humphrey, Kendrick & Wesman, 1975).

The court also asserted that the tests used were culturally biased because they were standardized on white middle-class children and thus measured psychological and environmental factors unrelated to the true abilities of black children. The court was echoing the universal claim among test critics that standardized tests are heavily biased against poor racial and ethnic minorities because they fail to take into account differences in dialect, value orientation, acquired information, or the importance of the situation or social setting in which tests are administered, and thus they consistently underpredict the potential ability of those children (e.g., Baca & Cervantes, 1978; Baratz & Baratz, 1969; Bernal, 1975; Dent, 1976; Oakland & Matuszek, 1977; Rivers, Henderson, Jones, Ladner & Williams, 1975; Samuda, 1976). But, if the assumption in *Hobson* that tests can and should measure innate ability is false, then the condemnation of tests as not reflecting the dominant culture may be misconceived.

The consensus—although not the unanimous view—among psychologists, as reflected in the report of the American Psychological Association Ad Hoc Committee on the Educational Uses of Tests with Disadvantaged Students (Cleary et al., 1975) is:

> [W]hat the tests have measured with greater or lesser validity and comprehensiveness . . . is the possession of abilities that are demonstrated to be useful in predicting future learning. . . . By and large, when properly applied and interpreted, they have predicted future learning for all segments of our society with

> modest but significant validity and generalizability [p. 24]. (But see Jackson, 1975).

Thus, tests, it is claimed, may be useful in measuring how well students acquire the skills taught by the school system and how well they may do at the next level in the educational hierachy. The tests, rather than reflecting cultural inferiority, are indicative of the educational—not genetic—deficiencies of minority children and, more importantly, perhaps, the inadequacy of public schools in their present state. "The flaw is in our educational system, from primary school right through college. A tremendous amount of talent is being wasted. . . . [T]ests have been helpful in documenting the severity of the problem (Green, 1978, p. 669)." In this respect "tests are not bigoted villains but color-blind measuring instruments that have demonstrated a social problem to be solved (Green, 1978, p. 669)." If the tests are culturally biased, "they are biased for a reason: the school experience itself is culturally biased (Note, 1968, p. 161)."

The problem lies in defining the nature of the test. If the test is perceived as a measure of achievement, then a low score calls for additional effort on the part of the school to remedy the problem. The bias occurs when the low score is perceived as a measure of pure aptitude. In that case, the low score "may be interpreted as an indication that there is insufficient capacity on that test taker's part to achieve; therefore, any additional educational effort would be wasted (Flaugher, 1978, p. 672)." Insofar as the District of Columbia was failing to provide the educational resources to help low-scoring children compensate for academic deficiencies, perhaps the proper remedy should have been the improvement of the manner in which the children were taught, and a prohibition against their classification as mentally retarded, not the proscription against the use of ability tests on the ground that they did not measure innate aptitude. But, as we are about to see, all of these issues were raised in dramatic form once again in San Francisco and Chicago where the controversy concerning the cultural bias of individual intelligence tests moved to the forefront.

## LARRY P. v RILES

If *Hobson* was the seminal case of the 1960s, *Larry P. v. Riles* (1972, 1979) deserves similar status for the 1970's. The trial court's decision on the merits, which took eight years to reach, threatens the continued administration of individual intelligence tests and the existence of EMR classes as they involve minority children. As the rationale of the decision will almost certainly guide future litigation concerning psychological assessment, the case warrants detailed examination. The case has had two phases: the granting of a preliminary injunction in 1972 (or *Riles I* as it will be called here), and the decision on the merits in 1979 (*Riles II*).

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## Riles I: Preliminary Injunction

In 1971 black children attending the San Francisco schools filed suit in federal district court charging discrimination in their placement in EMR classes as a result of having scored lower than 75 on state-approved intelligence tests. The plaintiffs claimed they were not mentally retarded and that the tests used to place them were culturally biased. They alleged that the resultant classification violated the equal protection clause of the 14th amendment (i.e., no state shall "deny to any person within its jurisdiction the equal protection of the laws"; for 14th amendment purposes local school systems are considered arms of the state). They requested that the court grant a preliminary injunction restraining the school system from administering IQ tests to determine EMR placement of black children until there was a full trial to decide the merits of their complaint.

To support their claim of misclassification, the plaintiffs presented affidavits from several black psychologists who had retested the children. Although they administered the identical tests initially given the plaintiffs, the psychologists did so only after they made attempts to establish rapport, took pains to reduce distraction, and reworded items in language considered more consistent with the children's cultural background. Scoring procedures were changed so that the children were given credit for nonstandard answers that were judged to show an intelligent approach to solving the problem. The consequence of these efforts was that on retesting all of the plaintiffs scored above the 75 IQ cutoff point.

The legal importance of the case in 1971 lay in the plaintiff's contention that the testing practices in San Francisco resulted in a disproportionate and harmful impact on black children in violation of the equal protection clause. Framed in that manner, a court was faced squarely for the first time with the issue of the constitutionality of individual psychological testing when used for placement in classes for the retarded in situations adversely affecting racial minorities.

The undisputed facts in the case were that although blacks constituted only 28.5 percent of students in the San Francisco school system, 66 percent of all students in its EMR program were black. Similarly, although blacks comprised 9.1 percent of the California school population, 27 percent of all school children in the state in EMR classes were black. Thus, the contention of the plaintiffs was that although placement in EMR classes was based on intelligence, not race, the method of classification led to a disproportionate impact on black children. In that light they argued that the court reverse traditional procedures that would require plaintiffs to show that the defendants' actions were arbitrary and irrational. Rather, they requested the court to rule that the school system should shoulder the burden of proving that their classification process was reasonable.

The plaintiffs, at the time, were on strong legal ground for urging this shift. The year before *Larry P.* was first heard, the Supreme Court had decided *Griggs v. Duke Power Co.* (1971). There, in an action brought under the 1964 Civil Rights Act, black employees challenged the use of intelligence tests as a condition of employment or transfer to certain positions for which they were otherwise qualified. The employers claimed that while the use of the test may have had a discriminatory effect in that fewer blacks were hired or promoted, they had no intent to discriminate. The Supreme Court, however, interpreted the Civil Rights Act as proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation (*Griggs v. Duke Power Co.*, 1971, p. 431)." It declared that "good intent or absence of discriminatory intent does not redeem . . . testing mechanisms that operate as 'built-in headwinds' for minority groups . . . [p. 432]." Once the discriminatory effect was shown, the Court placed the burden in cases brought under the Civil Rights Act on defendants to show "that any given requirement ha[d] a manifest relationship to the employment in question [p. 432]."

Faced with the task of demonstrating a rational connection between the IQ tests and the purpose for which they were used, i.e., placement in EMR classes, the school system in 1972 candidly agreed that the tests were racially and culturally biased but justified their continued use on the fact that, in the absence of suitable alternatives, they were the best means available for the purpose of classifying students as retarded. The court retorted that "the absence of any rational means of identifying children in need of such treatment can hardly render acceptable an otherwise concededly irrational means, such as the IQ tests as it is presently administered to black students (*Riles I*, 1972, p. 1313)."

Other attempts to sustain the reasonableness of their practices or to explain racial disproportionality in EMR programs also were rejected and the court ultimately held that San Francisco had failed to sustain "their burden of demonstrating that IQ tests are rationally related to the purpose of segregating students according to their ability to learn in regular classes, at least insofar as those tests are applied to black students [p. 1313]." The school system's practices were adjudged to violate the equal protection clause. The court enjoined any future placement of black children in EMR classes on the basis of criteria that relied primarily on the results of intelligence tests and led to racial imbalance in such classes (for an empirically-based defense of the part school psychologists played in the evaluation of these children see Meyers, Macmillan, & Yoshida, 1978). Carefully wording its injunction, the court condemned only the existing method of testing black children. Despite plaintiffs' request and contrary to what would later be a strong mandate in Pub. L. 94-142 to place handicapped children in regular classrooms to the extent possible, the court refused to order reassignment of black children already in EMR classes and upheld the practice of segregating such students.

Three events followed the court's decision. An appellate tribunal in 1974, affirmed the lower court's order holding that "the carefully limited relief granted [was] justified by the 'peculiar facts' of this case (*Larry P. v. Riles*, 1974, p. 965)." Then the trial court approved the plaintiff's motion to broaden the injunction so as to prohibit the administration of individual intelligence tests to

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all black children in the state. Finally, California itself decided to go beyond even that ban. In 1975, it issued a resolution stating that until further notice none of the IQ tests then on its approved list could be used to place any children regardless of race in EMR classes in the state.

This activity ended the first phase of the case. The second phase, the trial on the substantive issues, did not begin until October 1977 and did not end until mid-1978, producing over 10,000 pages of testimony. Only in October 1979 did the court finally publish its opinion in which it decided whether the preliminary injunction it granted in 1972 should become permanent.

## Intervening Events

Three elements in *Riles I* assumed importance as a result of subsequent actions by the Supreme Court and Congress. First, the plaintiffs claimed that the defendants had infringed constitutional rights, not that they had violated a federal or state statute. Second, the court ruled that injury resulted only from an intelligence classification that had a discriminatory effect, not from an intent to discriminate. Third, the court relied heavily on *Griggs v. Duke Power Co.* (1971) to support its decision that the defendant had the burden of persuasion concerning the reasonableness of its testing practices. Each of these were eventually to cause serious problems for the plaintiffs as a result of legal activity between 1972 and 1979.

Of crucial importance was the Supreme Court's decision in 1976 in *Washington v. Davis*, a case which has had a significant impact on testing litigation brought on grounds similar to that in *Larry P. Davis* arose when two black applicants for positions as police officers filed suit against the District of Columbia contending that the police department used a written personnel test that excluded a disproportionately high number of black applicants. The federal court of appeals applied the legal standards applicable to the 1964 Civil Rights Act developed in *Griggs* to resolve the black candidates' constitutional argument that the use of the test invidiously discriminated against them and hence denied blacks equal protection. In a decision that surprised and angered many civil rights advocates, the Supreme Court reversed the appellate court's decision, rejecting the contention that the *constitutional* standard for adjudicating claims of racial discrimination was identical to the *statutory* standard under the Civil Rights Act: "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact (*Washington v. Davis*, 1976, p. 239)." Thus, the Court declined to apply the more rigorous standard of the Civil Rights Act to the Constitution. It considered the more probing judicial review under the Act and its lessened deference to the seemingly reasonable acts of administrative officials inappropriate "under the Constitution where special racial impact, without discriminatory purpose, is claimed [p. 247]."

Since 1976 the Supreme Court has made it clear that disproportionate impact "is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations (*Washington v. Davis*, 1976, [p. 237]." In the second significant post-*Riles I*, case, *San Antonio Independent Sch. Dist. v. Rodriguez* (1973), the Supreme Court held that education is not a fundamental right, and thus not deserving the highest level of constitutional protection.

These two decisions severely undercut the chances of the plaintiffs in *Riles* gaining eventual victory on the merits. Given that education could no longer be considered a fundamental right and that, when a constitutional injury was alleged, minority plaintiffs must prove intent to discriminate, it was unlikely that the *Riles* court could employ the same reasoning that was persuasive at the preliminary injunction stage. For the court in *Riles II* to find a constitutional violation, it would have to sift through the testimony to uncover evidence of intent, not merely discriminatory effect. This increased the burden on the plaintiffs, as proving discrimination is more difficult when intent rather than effect (i.e., statistical disparity) is at issue.

In this light, it is significant that while the Supreme Court was restricting the reach of the equal protection clause, Congress enacted a series of laws that continue to have a considerable impact on the practice of psychological assessment in the public schools. In 1975 Congress passed Pub. L. 94-142 (20 U.S.C. §§ 1401-1461), the Education for All Handicapped Children Act, extending legislation protecting handicapped students it had first passed in 1966 and 1974. Two years earlier it enacted § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and subsequently amended in 1978. Implementing regulations for both those bills were drafted by the Department of Health, Education, and Welfare (now Department of Health and Human Services and the Department of Education) which took effect in 1977.

Pub. L. 94-142 is essentially a grant-giving statute providing financial support to state and local education agencies for special education and related services if they meet certain detailed eligibility requirements. Earlier legislation (Pub. L. 93-380) had put school systems on notice that they would have to develop methods for insuring that any assessment devices used "for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially and culturally discriminatory." Pub. L. 94-142 and its implementing regulations reaffirmed this mandate concerning nondiscriminatory evaluation and fleshed out the meaning of this requirement. Sec. 300.532 of the regulations states:

> (a) Tests and other evaluation materials:
>
> (1) Are provided and administered in the child's native language or other mode of communication. . . .
>
> (2) Have been validated for the specific purpose for which they are used; and

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> (3) Are administered by trained personnel in conformance with instructions provided by their producer. . . .

The most ambiguous of these provisions is (a) (2). The regulations, on their face, require test validation but not test validity. Even if one infers that both are necessary, there is no indication to what level of validity a test must conform. Validity coefficients that psychologists find acceptable may not pass constitutional muster. One court has ruled that "when a program talks about labeling someone as a particular type and such a label could remain with him for the remainder of his life, the margin of error must be almost nil (*Merriken v. Cressman*, 1973, p. 920)." "Nil" implies almost nearly perfect coefficients. Few, if any, psychometric instruments yield reliability, much less validity, coefficients above .95. Until the decision in *Riles II*, as we shall see, there were few clearcut judicial or statutory guidelines with regard to standards of validity in school testing or the general concept of nondiscriminatory assessment.

With regard to the Rehabilitation Act, a multipurpose law to promote the education, employment, and training of handicapped persons, Congress declared in § 504 that: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." This section represents the first federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap. The language of § 504 is almost identical to the 1964 Civil Rights Act and can be interpreted to be just as encompassing. Unlike Pub. L. 94-142, the requirements of § 504 are not triggered by receipt of funds under a specific statute but protect handicapped persons in all institutions receiving federal financial assistance. Thus, any school system, public or private, receiving federal monies for any program or activity whatsoever, is bound by its mandates.

In mid-1977, the Office for Civil Rights, DHEW, published a lengthy set of regulations implementing the broad right-granting language of § 504. Subpart D of six subparts pertains to preschool, elementary, and secondary education. In addition to general principles already established under Pub. L. 94-142, they include rules for the evaluation of children suspected of being handicapped. The language of those provisions (including the requirement of validated tests) are almost identical to that which now appear in the implementing regulations to Pub. L. 94-142 and will not be repeated here.

## Riles II: Decision on the Merits

Given the outcome in *Washington v. Davis* (1976) and the passage of federal legislation protecting handicapped persons, the plaintiffs in *Larry P.* sought to amend their original complaint in an attempt to heighten their chances of eventual victory. In 1977 they filed an amendment alleging, in addition to the equal protection claim under the Constitution, that the defendants had violated the 1964 Civil Rights Act (where, presumably, only discriminatory effect, not intent, would have to be proven). The court granted the motion to amend. It also, later in that year, granted a motion permitting the U.S. Department of Justice to participate as amicus curiae (friend of the court). The government, siding with the plaintiffs, asserted that the state's conduct also violated Pub. L. 94-142 and § 504. The plaintiffs then filed a motion asking if it could amend its complaint a second time to also include an allegation that the defendants violated Pub. L. 94-142. This motion was also granted.

Taking almost eighteen months from the time the trial ended to sift through the myriad claims and voluminous testimony, Judge Peckham finally published his long, controversial opinion on the merits in October 1979. The court found in favor of the plaintiffs on both statutory and constitutional grounds. It permanently enjoined the defendants "from utilizing, permitting the use of, or approving the use of any standardized tests . . . for the identification of black EMR children or their placement into EMR classes, without first securing prior approval by this court [p. 989]."

The court's primary focus was on the nondiscriminatory provisions of § 504 and Pub. L. 94-142, particularly that part of the implementing regulations requiring that assessment instruments be "validated for the specific purpose for which they are used." The court's interpretation of these provisions, of crucial importance in its ultimate decision and the shaping of the final remedy, broke new ground, for as the court recognized, "there are no cases applying validation criteria to tests used for ER placement [p. 969]."

The court relied on analogous cases for guidance. In *Griggs*, the Supreme Court held that to rebut a prima facie case of discrimination (i.e., evidence of disparate impact) brought by employees who claim employers' use of tests creates a disproportionate impact on minorities, employers must show that the test has a manifest relationship to the position for which the test is required. If this is done, the burden shifts to plaintiffs who may then submit evidence that alternative selection procedures exist that would serve the employers' purposes as well without producing discriminatory effects. The court in *Riles II* accepted the burden-shifting approach but found it impossible to translate *Griggs*' manifest relationship test to educational settings:

> If tests can predict that a person is going to be a poor employee, the employer can legitimately deny that person a job, but if tests suggest that a young child is probably going to be a poor student, the school cannot on that basis alone deny that child the opportunity to improve and develop the academic skills necessary to success in our society. Assignment to EMR classes denies that opportunity through relegation to a markedly inferior, essentially dead-end track [p. 969]."

As an alternative, the court held that defendants should bear the burden of proving that the tests used for placement had been validated for black children.

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However, it would not merely accept proof that the tests used were able to predict school performance. It adopted the more stringent requirement that the tests be shown valid for selecting children who would be unable to profit from instruction in regular classes with remedial instruction. The tests would have to accurately identify those children who belonged in what the court characterized as isolated, dead-end, stigmatizing EMR programs. This kind of validation, the court found, had not been done. "[D]efendants must come forward and show that they [the tests] have been validated for each minority group with which they are used. . . . This minimal burden has not been met for diagnosing the kind of mental retardation justifying the EMR placement [p. 971]." The few studies that had been brought to the court's attention were not considered relevant. The court rejected validity studies correlating IQ scores with college grades or with other achievement tests. It was satisfied only with research relating IQ scores of black children with classroom grades, although the latter were admittedly subjective. The one relevant study cited (Goldman and Hartig, 1976) yielded correlations between IQ scores and grades for white children of .25 and only .14 for blacks. One prominent psychologist who testified about the study, concluded that the WISC had "little or no validity for predicting the scholastic performance of black or brown children [p. 972]." Thus, the court concluded that "the I.Q. tests are differentially valid for black and white children. . . . Differential validity means that more errors will be made for black children than whites, and that is unacceptable [p. 973]."

The court continued its analysis and found that alternative mechanisms for determining placement in EMR classes did exist. Between 1975 and the resolution of this case in 1979, there had been a state-wide moratorium on the use of IQ tests to place all children, regardless of race, in EMR programs. The state's own employees, called as adverse witnesses by the plaintiffs, testified that adequate assessments had been made during that period without IQ tests, and that there was no evidence to suggest that misplacements had occurred as a result. In fact, the court found that more time and care had been taken during this period in placing children in EMR classes:

> School psychologists, teachers, and others involved in the process are now making decisions based on a wide number of factors, and the evidence suggests that the results are less discriminatory than they were under the I.Q.-centered standard. Evaluations can and are taking place through, *inter alia*, more thorough assessments of the child's personal history and development, adaptive behavior both inside and outside of the school environment, and classroom performance and academic achievement [p. 973].

Nevertheless, the court warned, alternatives to IQ tests themselves had not been validated, and disproportionate placement, while less egregious than in the pre-1975 era, was still present. Continued use of tests would still be needed: not, however, for the purpose of labeling children as retarded, but for "the development of curricula that respond to specific educational needs [p. 974]."

Judge Peckham was not content to rest his decision solely on statutory grounds. Testing for EMR placement had been preliminarily enjoined in *Riles I* on the basis of equal protection claims, and the court felt bound to determine whether the plaintiffs continued to warrant relief under the Constitution "where this litigation commenced [p. 975]." But, the plaintiffs' task under the fourteenth amendment, given *Davis*, was not as simple as it was under federal law. "The difficult question of intent [had] moved to center stage [p. 975]." The court felt the problem had been made more burdensome because of what it perceived to be the failure of the federal judiciary to delineate a precise formula for determining intentional discrimination. It felt uncomfortable relying solely on a decision that would measure intent by establishing that the state's conduct had the natural and foreseeable consequences of producing a discriminatory effect. Several lower federal courts had used that approach in post-*Davis* cases but the Ninth Circuit (in which the *Riles* court was located) had not yet explicitly adopted it, and the Supreme Court, a few months prior to *Riles II*, had warned that while "inevitability or foreseeability of consequences [permits] a strong inference that the adverse effects were desired [it was but] . . . a working tool, not a synonym for proof (*Personnel Admin'r of Mass. v. Feeney*, 1979, p. 279)."

The court, therefore, felt compelled to go beyond equating disproportionate impact with discriminatory intent, although that impact might have been the natural and foreseeable result of the state's conduct. The plaintiffs had to prove more. Yet the court, in *Riles II*, made clear that it would not so narrowly define discriminatory purpose "to mean an intent to harm black children [p. 979]." It would suffice if plaintiffs showed an intent to segregate those children into classes for the educably retarded. In the end, the court was satisfied that the plaintiffs had met this burden.

The court's conclusion was grounded in a detailed and lengthy analysis of California's education system generally, and its programs for retarded children specifically. It asserted that the state had been unable to meet the educational needs of disadvantaged children for most of its history, and viewed placement of blacks in EMR classes as but one aspect of this failure. But it was the EMR program which received the brunt of the court's condemnation. Throughout the opinion, Judge Peckham labeled the program "dead-end," "isolating," "inferior," and "stigmatizing." Relying on either the testimony of state employees or printed material of the state department of education, the court concluded that EMR classes were "designed to separate out children who are *incapable* of learning in regular classes [p. 941]" [emphasis in the original] and were not meant to provide remedial instruction so that children could learn the skills necessary for eventual return to regular instruction. Given these characteristics, the court considered "the decision to place children in these classes . . . a crucial one. Children wrongly placed in these classes are unlikely to escape as they inevitably lag farther and farther behind the children in regular classes [p. 942]." Coupled with this pejorative view of the EMR program was the undeniable

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substantial overrepresentation of black children in those classes, a fact essentially unchanged from *Riles I*.

The next step in the court's analysis was a review of the process by which a disproportionate number of black children were placed in EMR classes. It found that although California had acknowledged in 1969 that minorities were overrepresented in EMR classes, it chose for the first time in that year to mandate the use of specific standardized individual intelligence tests for EMR placement. The list had been developed by a state department of education official who was not an expert in IQ testing, and was formulated primarily by surveying which tests had been most frequently used by California's school psychologists and by relying on the recommendations of test publishers. The court concluded that this "quick and unsystematic" process failed to consider "critical issues stemming from I.Q. testing," [p. 946] and its reaction was harsh: "[B]y relying on the most commonly used tests, they [the defendants] opted to perpetuate any discriminatory effects of those tests. [p. 947]."

Before it would scrutinize whether the tests were indeed discriminatory, the court felt bound to determine, as it had in *Riles I*, whether IQ tests were the primary determinant in EMR placement. Once again, it concluded that they were. Of further importance, despite California's statutory scheme that required the consideration of other pertinent and specified data, the state's own investigation of the placement process revealed that about one-third of EMR pupils' records contained no estimates of adaptive behavior, and that over one-quarter were missing a history of physical and social development. In contrast, "the I.Q. score was clearly the most scrupulously kept record, and it appears to have been the most important one [p. 950]." Thus, the court hypothesized, "if the I.Q. tests are discriminatory, they inevitably must bias the entire process [p. 950]."

These initial analyses finally brought the court to the central issue: the nature of the intelligence tests themselves. Expert witnesses for both plaintiffs and defendants had agreed on two crucial facts. First, that it was impossible to "truly define, much less measure, intelligence;" and that instead, "I.Q. tests, like other ability tests, essentially measure achievement . . . [p. 38]," a significant departure from the assumption in *Hobson* and *Riles I* that the tests measure innate ability. Second, black children did significantly less well on intelligence tests than did their white counterparts. Only two percent of white students in California achieved IQ scores below 70 while 15 percent of black students did. The court's introductory question was why the tests had not been modified to remove this disparity in the same way that differences between males and females had been excised from early versions of the Stanford-Binet Intelligence Scale. While the court agreed that equalizing scores of minorities and whites might be difficult, it criticized testing experts for being "willing to tolerate or even encourage tests that portray minorities, especially blacks, as intellectually inferior [p. 955]." The court then proceeded to discover if there were any acceptable explanations for the significantly disparate scores of blacks and whites on IQ tests.

It confronted the most controversial explanation first—that the differences between the races were genetic in origin but rejected any notion of inherent inferiority in black children. The defendants themselves eschewed reliance on this ground, although at least one psychological expert witness for the state did not rule out such an explanation. The court reasoned that the genetic theory overlooked the possibility of bias in the tests, and noted that believing intelligence is inherited did not lead inexorably to the conclusion that blacks were intellectually inferior.

The court gave somewhat more serious consideration to a socioeconomic theory upon which the defendants relied. The state claimed that differences in scores resulted from the rearing of poor children, both black and white, in inadequate homes and neighborhoods. But, while the court could accept the theory that poverty resulted in mental retardation, it refused to conclude that membership in the lower socioeconomic classes produced substantially more mentally retarded children. Why, the court asked, would inadequate financial resources produce only disproportionately more mildly retarded children found in EMR classes and not those with severe intellectual deficits?

The court then examined the hypothesis that cultural bias in the tests was the most cogent explanation for the disparities. The court noted that versions of the Stanford-Binet and Wechsler scales prior to the 1970s had been developed using only white children in the process of deriving norms against which all children would be measured. That these tests had been restandardized in the early 1970s to include a representative proportion of black children did not satisfy the court that they were valid for culturally different groups. "Mixing the populations without more does not eliminate any preexisting bias [p. 957]." The process failed to yield data that could be used to compare black and white children's performance on particular items.

In addition to standardization problems, the court identified two other indices of cultural bias. First, to the extent that black children were more likely to be exposed to nonstandard English, they would be handicapped in the verbal component of intelligence tests. Second, it averred that certain items were inherently unfair to black children from culturally different environments when viewed from the perspective of the scoring criteria offered in the examiners' manual. The court concluded that "to the extent that a 'black culture' exists and translates the phenomenon of intelligence into skills and knowledge untested by the standardized intelligence tests, those tests cannot measure the capabilities of black children [p. 960]." The court charged that the tests were never designed to eliminate bias against black children and blamed test developers and users for assuming "in effect that black children were less 'intelligent' than whites [pp. 956-957]."

In sum, the court had constructed an analytic web from which the defendants could not extricate themselves. By defining purposeful discrimination to mean the intent to segregate minority children into special, isolated classes, the court laid the groundwork for vindication of the plaintiffs' claims. It judged California's EMR program to be a substandard, stigmatizing means of education, a virtual prison from which black children could not easily escape. It concluded that the state knew for a decade prior to 1979 that EMR classes were populated by a disproportionate number of minority children placed primarily on the basis of intelligence tests mandated by the state. The process by which these tests were chosen were haphazard, unthinking and suspect, making "the inference of discriminatory intent . . . inescapable [p. 981]."

> The decision by the State Department of Education in 1969 to compel the use of standardized I.Q. tests . . . reveals the impermissible intent to discriminate. . . .
>
> [I]t had profound discriminatory effects. It doomed large numbers of black children to EMR status, racially imbalanced classes, an inferior and "dead-end" education, and the stigma that inevitably comes from the use of the label "retarded". That impact was not foreseeable but foreseen and appropriate inferences must be drawn. [p. 980].

The tests themselves were seen by both plaintiffs' and defendants' expert witnesses to be culturally biased since none of them had been specifically validated for black children:

> Defendants' complete failure to ascertain or attempt to ascertain the validity of the tests for minority children cannot be ignored. Rather defendants' actions resulting in the adoption of the I.Q. tests can only be explained as the product of the impermissible and scientifically dubious assumption that black children as a group are inherently less capable of academic achievement than white children [p. 981–982].

Perhaps most damaging to the defendants' position was the court's harsh perception of the state's conduct. It condemned the complacency and negligence of the state department of education in the face of explicit legislative concern about biased testing and disproportionate enrollment of minorities in EMR classes. The court charged that the state board of education had not investigated these problems, had not inquired into significant variances in the racial and ethnic composition of classes for the retarded, and failed to monitor implementation of protections imposed by the legislature to insure that placement decisions would be made on bases other than IQ tests. The court concluded that the state's conduct "must be seen as a desire to perpetuate the segregation of minorities in inferior, dead end, and stigmatizing classes for the retarded [p. 983]."

Thus the plaintiffs were held to have met their burden of proving discriminatory intent. The defendants could prevail only if explanations for their conduct passed muster under the most exacting of the equal protection tests. However, the court held, "defendants can establish no compelling state interest in the use of the I.Q. tests nor in the maintenance of EMR classes with overwhelming disproportions of black enrollment [p. 985]."

After finding for plaintiffs under both federal law and the Constitution (as well as the California Constitution), all that was left for the court was to forge proper remedies. In doing so it recognized the genuine changes initiated by California during the course of litigation and the complexity and risk of judicial interference in the administration of education. It also did not want its condemnation of intelligence tests to be seen as the final judgment on the scientific validity of such devices. But these concerns did not dissuade the court from holding the state responsible for its failure to properly assess and educate black children, and from fashioning remedies to halt both test abuse and disproportionate enrollment of blacks in EMR classes.

The court permanently enjoined the state from using any standardized intelligence tests to identify black children for EMR placement without first securing approval from the court. The state board of education would have to petition the court after determining that the tests they sought to use were not racially or culturally discriminatory, that they would be administered in a nondiscriminatory manner, and that they had been validated for the purpose of placing black children in EMR classes. The petition would have to be supported by statistical evidence submitted under oath, and certification that public hearings had been held concerning the proposed tests.

With regard to disproportionate placement, the state was ordered to monitor and eliminate overrepresentation by obtaining annual data documenting enrollment in EMR classes by race and ethnicity, and by requiring each school district to prepare and adopt plans to correct significant imbalances. To remedy the harm to those children misidentified, the defendants were to reevaluate all black children then labeled as educably retarded without resort to any standardized intelligence tests that had not been approved by the court. Finally, schools would have to draft individual education plans designed to return all incorrectly identified children to regular classrooms.

The decision, over the objection of the California state board of education, has been appealed by Defendant Riles to the Ninth Circuit Court of Appeals. As of this writing, the appellate tribunal has not yet heard the case.

## PASE v. HANNON

Almost nine months to the day after Judge Peckham issued his opinion in *Riles II*, Judge Grady of the federal court in the Northern District of Illinois rendered his decision in *PASE* (Parents in Action on Special Education) *v. Hannon* (1980). While the facts, issues, claims, and witnesses were very similar to *Larry P.*, the analysis and outcome could not have been more different. Rather than ruling that the tests in question were culturally biased, as did Judge Peckham, Judge Grady held "that the WISC, WISC-R and Stanford-Binet tests, when used in conjunction with the statutorily mandated ['other criteria'] for determining an appropriate educational program for a child' [under Pub. L. 94-42] . . . do not

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discriminate against black children in the Chicago public schools. Defendants are complying with that statutory mandate (*PASE v. Hannon*, 1980, p. 883)."

The case was brought on behalf of all black children who were or would in the future be placed in Chicago's EMR classes. Like the plaintiffs in *Larry P.*, they claimed that blacks were overrepresented in those programs. However, Chicago's schools are predominantly minority so the dramatic disproportionality evident in San Francisco could not be so pointedly displayed in Chicago. About 62 percent of Chicago's public school system is black. But, 82 percent of the children in EMR classes are black. Looked at another way, however, the overpresentation was more visible. Of all the white children in the school system, 1.3 percent are labeled as educably retarded; of all the black children, 3.7 percent are so labeled. As in San Francisco, the EMR curriculum is oriented toward socialization, language skills, and vocational training. Any academic education is limited to helping the child become economically independent. Children who graduate from EMR classes are not qualified for college entrance, nor do they receive a regular diploma. The court called inappropriate placement in EMR classes "an educational tragedy [p. 834]" and accepted as fact that even for children properly placed, EMR students "suffer from feelings of inferiority [p. 834]." Thus, it could be concluded that, as in *Riles II*, Judge Grady perceived EMR classes as dead-end, stigmatizing, isolating placements.

Using a strategy similar to that in *Larry P.*, the two named plaintiffs in *PASE* showed that although they were placed in EMR classes for several years, they were not genuinely retarded. Recent reevaluations indicated they were children of normal intelligence whose learning was hampered by remediable disabilities. The plaintiffs claimed that the misassessment was caused by racial bias in the individually-administered IQ tests. The use of those tests, they claimed, violated the equal protection clause of the Constitution, as well as the same federal statues at issue in *Larry P.* (e.g., Title VI of the 1964 Civil Rights Act, Pub. L. 94-142, § 504 of the Rehabilitation Act of 1973). The Department of Justice was permitted to enter the case as an amicus on the side of the plaintiffs. While the case had been pending for about a half-dozen years, unlike *Larry P.*, the trial itself lasted only three weeks. Many, though not all, of the witnesses that appeared in *Riles II* also testified for the plaintiffs in *PASE* and offered similar testimony concerning the history of IQ misuse and cultural bias. The defendants conceded that the tests could be slightly biased but asserted that this did not deprive the tests of their utility; nor did the use of the tests result in misclassification. The school system reminded the court that the ultimate diagnosis of retardation was based on a combination of factors and that the IQ score was only one of them. They were concerned that the absence of this relatively objective measure would force the school to make decisions on predominantly subjective criteria.

While Judge Peckham carefully listened to and frequently cited the opinions of the expert witnesses who testified in San Francisco, Judge Grady was significantly less influenced by those same witnesses in Chicago:

> None of the witnesses in this case has so impressed me with his or her credibility or expertise that I would feel secure in basing a decision simply upon his or her opinion. In some instances, I am satisfied that the opinions expressed are more the result of doctrinaire commitment to a preconceived idea than they are the result of scientific inquiry. I need something more than the conclusions of the witnesses in order to arrive at my own conclusion. (*PASE v. Hannon*, 1980, p. 836).

Judge Grady claimed to have considered the expert testimony, but stated that he was not bound by it. What he felt it imperative to do was to examine the tests themselves, item by item, so he could judge for himself whether the claim of cultural bias could be sustained. He concluded that he could not see how an informed decision concerning the question could be reached in any other way. He had no reservations about his competency to make those determinations. Thus, in a startling and extraordinary manuever, Judge Grady proceeded to cite every question on the WISC, WISC-R, and the Stanford-Binet and to give every acceptable response (including both the two- and one-point answers where pertinent) for the purpose of determining which items, in the court's estimation, were culturally biased against black children. This process took nearly 35 of the court's 52-page opinion.

The end result of this analysis was the court's conclusion that only eight items on the WISC or WISC-R and one item on the Binet were "biased or so subject to suspicion of bias that they should not be used [p. 875]." He rejected the assertions of Robert Williams, the black psychologist who had devised the BITCH test (Black Intelligence Test of Cultural Homogeniety) that many other items were unfair to blacks:

> It would be possible to devise countless esoteric tests which would be failed by persons unfamiliar with particular subject matter. Every ethnic group . . . has its own vocabulary, its own universe of information, which is not generally shared by others. The fact that it would be possible to prepare an unfair test does not prove that the Weschler or Stanford-Binet tests are unfair.
>
> Dr. Williams' criticism of many test items appear unrelated to the question of racial bias. In fact, of the relatively few items he did discuss, most of them were criticized as inappropriate tests of any child's intelligence, not simply a black child's intelligence [pp. 874-875].

Which then, were the items the court condemned? The following comprises the complete list:

*WISC WISC-R*

1. What is the color of rubies?
2. What does C.O.D. mean?
3. Why is it better to pay bills by check than by cash?
4. What would you do if you were sent to buy a loaf of bread and the grocer said that he did not have any more?

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5. What does the stomach do?
6. Why is it generally better to give money to an organized charity than to a street beggar?
7. What are you supposed to do if you find someone's wallet or pocket book in a store?
8. What is the thing to do if a boy (girl) much smaller than yourself starts to fight with you?

Only the last four questions appear on the now more universally used WISC-R. In the Stanford-Binet test, the only item judged to be biased is the one that appears at the four and one-half year old level in which the child is asked to determine which one of two girls is prettier.

Nothwithstanding these infirm items, the court concluded that the tests did not inexorably lead to misclassification and erroneous placement in EMR programs. The court's rationale for this ruling was fourfold:

1. Missing any of these items does not disqualify the child from continuing with the subtest on which they appear as the child may continue with the subtest until there is an accumulation of consecutive misses.
2. Many of the items appear at the upper levels of the tests which young children, prime candidates for EMR placement, would not reach anyway.
3. IQ score is not the sole psychometric determinant of EMR placement; clinical judgment plays an important role in such decisions.
4. The IQ score and the psychologist s interpretation of the full evaluation are only two components of several which form the basis for EMR referral.

If the tests were not culturally biased, then, what was the explanation for the significant mean differences between white and black children's IQ scores? Like the parties in *Larry P.*, both the plaintiffs and defendants in *PASE* rejected a genetic theory: "There is no dispute . . . about the equality of innate intellectual capacity. Defendants assert no less strongly than plaintiffs that there are no genetic differences in mental capacity [p. 102]." Unlike the court in both *Riles I & II*, where Judge Peckham had rejected a socioeconomic explanation, Judge Grady found that argument persuasive. Accepting the arguments of the school system's witnesses that the acquisition of intellectual skills is greatly affected by a child's early intellectual stimulation the court reasoned:

> Defendants' explanation of the I.Q. difference, that it is caused by socio-economic factors . . . is consistent with other circumstances not accounted for by plaintiff's theory of cultural bias. It is uncontradicted that most of the children in the EMH classes do in fact come from the poverty pockets of the city. This tends to suggest that what is involved is not simply race but something associated with poverty. It is also significant that many black children who take the test score at levels high enough to preclude EMR placement. Plaintiffs have not explained why the alleged

> cultural bias of the tests did not result in EMH level scores for these children. Plaintiffs' theory of cultural bias simply ignores the fact that black children perform differently from each other on the tests. It also fails to explain the fact that some black children perform better than most whites [p. 878].

With that, the court concluded that the plaintiffs had failed to prove their contention that the intelligence tests were culturally unfair to black children. Even if they were, the court believed that still would not make the assessment process biased. Judge Grady read Pub. L. 94-142's prohibition against single measures and its requirement of nondiscriminatory assessment as meaning that the entire psychoeducational evaluation, when viewed as a whole, had to be nonbiased. A single procedure, by itself, could be discriminatory without condemning the entire system as invalid for placing minority children in EMR programs. The court reasoned that multiple procedures assured that results from the intelligence test would be interpreted in the light of other evaluation devices and information sources.

The court in *PASE*, therefore, viewed the placement process as a protective device against misclassification, in contrast to the court in *Riles II*, which concentrated on an analysis of the tests. Judge Peckham found California's system of assessment sound in theory, but condemned it in practice, finding that testing continued to loom as the most important determinant of EMR placement. Judge Grady scrutinized the process in Chicago and concluded that referral, screening, multidisciplinary evaluation, and the staff conference helped insure that misclassification did not occur. In fact, he found that for all subranges within the EMR classification scheme, fewer children were ultimately labeled as retarded than would have been the case based on their IQ score alone. Although the court conceded that some children are misplaced, it rejected the hypothesis that erroneous placements were due to racial bias in the intelligence tests. Thus, Judge Grady went beyond the plaintiffs' challenge to IQ tests and viewed the tests within the entire evaluation and decision-making process. However, for research that casts serious doubt on this analysis and contends that IQ is the critical causal variable in the placement, see Berk, Bridges, & Shih (1981). Nevertheless, as result in his final words, he found in favor of the school system:

> Intelligent administration by the I.Q. tests by qualified psychologists, followed by the evaluation procedures defendants use, should rarely result in the misassessment of a child of normal intelligence as one who is mentally retarded. There is no evidence in this record that such misassessments as do occur are the result of racial bias in text items or in any other aspect of the assessment process currently in use in the Chicago public school system [p. 883].

But what of Judge Peckham's decision in *Riles II*? *PASE* was decided almost a year after the federal court in California, scrutinizing the same tests Judge Grady found culturally fair, to be racially discriminatory and in violation of the

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Constitution as well as several federal laws. Many of the same witnesses appeared at both trials. Judge Grady's reference to *Larry P.* occupied a bit less than one page of his 52-page opinion, and he virtually rejected its persuasiveness out of hand. While he called it "lengthy and scholarly" he concluded that Judge Peckham's analysis never attacked what Judge Grady considered the threshold question—whether the tests were in fact biased. Judge Peckham, Judge Grady decided, had assumed that racial bias existed in the tests and then went on to analyze what legal consequences flowed from that finding. Judge Grady believed that one could not arrive at a proper decision concerning the plaintiffs' claims in either case without examining the issue of test bias in detail. As for the California court's ultimate decision, Judge Grady merely said, "the witnesses and the arguments which persuaded Judge Peckham have not persuaded me. [p. 882]."

The plaintiff school children have appealed Judge Grady's decision and at this writing there has been no decision by the appellate tribunal.*

## CRITIQUE OF LARRY P. AND PASE

While both *Riles II* and *PASE* affect the continued administration of psychological testing, the placement of children in special education programs, and the practice of school psychology, these two decisions, at bottom, are not testing cases, EMR cases, or psychology cases. They are racial discrimination cases flowing inexorably from *Brown v. Bd. of Educ.* (1954), once again litigating the claim of minority children to an integrated and equal education. *Riles II* and *PASE* merely reflect the most recent challenges to school practices that are perceived as attempts to continue, in a more sophisticated manner, the racial (and ethnic) separation more blatantly used in the early 1950s and 1960s (see also *Debra P. v. Turlington*, 1979, challenging minimal competency tests for high school diplomas).

Nevertheless, there is no doubt that in their disparate ways, *Riles II* and *PASE* will have a significant effect on professional practice in the schools. Before discussing their very real differences, however, one should note two important similarities. First, both counts had harsh perceptions concerning the present status of classes for the educably mentally retarded. It may not have been the original intent of the plaintiffs in these cases to criticize or condemn EMR programs, but that may be one of the more enduring results of these decisions. In fact, it may be true that in terms of effect on a profession, *Riles II* and *PASE* will have a greater impact on special education than psychology. In at least a dozen places, Judge Peckham called EMR classes dead-end, isolating, stigmatizing, inferior, substandard, and educational anacronisms. Judge Grady concluded that inappropriate placement in an EMR class was an educational tragedy and that such placement was likely to be "totally harmful." These are charges that transcend discrimination against minorities. Regardless of racial, ethnic, or gender identification, if the conclusions the courts drew are accurate, no child belongs in a program with such potentially powerful adverse consequences. That is more obviously true if the child is not genuinely retarded (but *see* MacMillan & Myers, 1980).

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*After this chapter went to press the plaintiffs filed a motion to dismiss their appeal in which they also request that Judge Grady's decision be vacated and declared moot. This action was taken in light of the decision by the Board of Education of the City of Chicago, as part of their desegregation plan, to voluntarily discontinue the use of standardized intelligence tests for use in special education placement. No decision is expected on this motion until late in 1982.

Second, both judges agreed that placement decisions in EMR programs cannot be based primarily on the use of intelligence tests. Where the two courts differed was in their perception of how important testing loomed in the placement process in Chicago and California. Judge Grady did not find that the intelligence test was relied upon unduly. He rejected the contention that the IQ score had an "hypnotic effect" on participants on the multidisciplinary team. He agreed with the school system that IQ scores were only one factor in the assessment of EMR placement. Perhaps most gratifying to school psychologists was his perception that, while EMR placement could not occur without the psychologist's recommendation, qualified psychologists were well trained not to mechanically advocate for a label of mental retardation on the basis of an IQ score that fell below the statutory cutoff point. The low score would be judged, he believed, in the context of the child's total performance that took into account the child's cultural background and data gleaned from other kinds of assessment procedures. Judge Grady saw the entire process of referral, screening and multidisciplinary evaluation, and conferences as protecting children, including minorities, from misclassification.

Judge Peckham, on the other hand, in *Riles II*, while agreeing that school psychologists, among others, had performed careful and thoughtful assessments, concluded that the decisionmaking process was contaminated by an I.Q.-centered standard and that as the intelligence tests were invalid, the ultimate decision was itself likely to be invalid. Judge Peckham's decision in *Riles II*, thus, does have meaning and impact, not only for school psychology but for all clinicians who rely on intelligence tests for decisionmaking. Broadly interpreted, *Riles II* casts doubt on the continued utility of traditional psychometric evaluations using psychology's current storehouse of standardized ability tests. The court required the state to meet several validity criteria before it would approve continued administration of intelligence tests:

1. Tests would have to yield the "same pattern of scores when administered to different groups of people [p. 41]."

2. Tests would have to yield approximately equal means for all subgroups included in the standardization sample.

3. Tests would have to be correlated with relevant concurrent or predictive measures. The court rejected validity studies correlating IQ scores with college grades or with other achievement tests. As all the experts agreed that intelligence

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tests were merely achievement tests by another name, the court in *Riles II* held that studies comparing IQ scores with scores on labeled achievement tests spuriously inflated validity coefficient because of "autocorrelation." The court would be satisfied only with research relating IQ scores of black children with classroom grades.

Given the court's definition of validity, it is unlikely that any of the currently used intelligence tests meet its criteria. In fact, it is unlikely that any psychological test, most particularly the commonly used personality and projective instruments, would be acceptable to the court.

It is worth reemphasizing that despite differences in perceptions, both courts generally condemned primary reliance on intelligence test results and inappropriate placement in academically-restricted, stigmatizing, educational programs. But the impact of even Judge Peckham's ultimate condemnation of the intelligence tests should not be too broadly interpretated. In its narrowest terms, *Riles II* affects relatively few children. The court held only that the state was permanently enjoined from using, permitting the use of, or approving the use of any standardized intelligence test for the identification of black EMR children or their placement into EMR classes. Under that precise holding, intelligence tests, even in California, can still be administered to all white children for any program and for all black children for any program other than those for the educably mentally retarded. In reality, the decision only affects a very small percentage of the population of school children in California. In 1977 there were about 4.5 million children enrolled in that state; less than 5000 were black children in EMR classes. (I am grateful to Prof. Dan Reschly for pointing out the implications of these statistics; see also Reschly, 1980.)

Of course, the most important disagreement between *Riles II* and *PASE* was their analyses of the allegation of cultural bias in the Wechsler Scales and the Stanford-Binet. Judge Peckham found the tests to be deficient on this ground; Judge Grady did not. The permanent injunction against the administration of individual intelligence tests to place black children in EMR classes in *Riles II* was based almost entirely on the court's conclusion that the tests were culturally biased. The persuasiveness of the court's opinion, therefore, depends almost entirely on the correctness of this finding. Regardless of whether one applauds or decries the result, there are unfortunate infirmities in the court's analysis. In like manner, Judge Grady's eventual holding that the black plaintiffs in *PASE* had failed to prove that the tests were discriminatory was based on his estimation of the absence of bias. The method by which he reached that judgment was embarrassingly devoid of intellectual integrity.

*Riles II* defined an unbiased test as one that yields "the same pattern of scores when administered to different groups of people [p. 41]." Such a definition is psychometrically unsound. Tests are fair when they predict with equal accuracy, not with equal results, for all groups. The court's definition "eliminates a priori any possibility of real group differences on various psychological traits.... (Schmidt & Hunter, 1974, p. 1)." The court rejected the possibility of genuine differences between black and white children on the basis of genetic inferiority and social class. Though the court rested its decision on the finding that the tests were culturally biased, it provided little hard data to support such a conclusion, and was tentative in discussing it. In fact, in its almost 70-page printed opinion, the empirical support for its conclusions consumed only one of these pages. Moreover, the court's determination that the tests contain questions biased against poor black children is not uniformly accepted, and there are some data to suggest that whatever discrimination there is in tests, lower scores in blacks are not the result of content bias.

By definition, achievement and intelligence tests will always fail to meet the demand for assessment devices devoid of environmental influence. Given what they purport to measure, they inevitably reflect the social setting of the test taker: "[All] behavior is... affected by the cultural milieu in which the individual is reared and since psychological tests are but samples of behavior, cultural influences will and should be reflected in test performance. It is therefore futile to try to devise a test that is *free* from cultural influences (Anastasi, 1976, p. 345)."

Efforts to produce culture-free tests or to reduce content bias have met with little success. "Nonverbal or performance tests are now generally recognized as falling short of the goal of freedom from cultural influences, and attempts to develop culture fair verbal tests ... are recognized as failures (Reschly, 1979, p. 231)." More specifically, Anastasi (1976) states: "On the WISC, for instance, black children usually find the Performance Tests as difficult or more difficult than the Verbal tests; this pattern is also characteristic of children from low socioeconomic levels [p. 348]." Kirp (1973) concludes: "[I]t is sobering but instructive to recognize that minority children do poorly even on so-called culture-free tests ... [p. 758]."

There has been relatively little research on content bias itself, particularly with regard to individual intelligence tests. What has been found with regard to standardized tests generally (Flaugher, 1978), or individual intelligence tests specifically (Reschly, 1980, Sandoval, 1979), do not support Judge Peckham's conclusions. For example, contrary to popular thought, such widely criticized questions on the WISC-R comprehension subtest as, "What is the thing to do if a boy (girl) much smaller than yourself starts to fight with you?" (a question that even Judge Grady found biased) may actually be easier for black children than they are for white (Reschly, 1979). Eliminating 13 items perceived to be biased from a widely used 82 item elementary reading test "did not improve the performance of schools with high minority populations relative to their performance on the original 'biased version' (Flaugher, 1978, p. 675)." Deleting what appear to be idiosyncratic items from group ability tests results only in "making the tests considerably more difficult for everyone, since many of the items [exhibiting] the

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widest discrepancy between groups [are] moderate to low in overall difficulty [p. 675].'' (See also Green, 1978; but see Oakland and Matuszek, 1977.) Most pertinently, Sandoval (1979) found no evidence of items bias on the WISC-R: ''The notion that there may be a number of items with radically different difficulties for children from different ethnic groups has not been supported [p. 925].'' Moreover, the interjudge agreement concerning cultural bias on the WISC-R appears very low (see Reschly citing Sandoval, 1980).

Although Judge Peckham can be faulted for his analysis of cultural discrimination in intelligence tests and for implying that the issue is more settled than it is, any criticism of his analysis does not imply that his conclusion is incorrect or that there is support for such alternative hypotheses as genetic—rejected by all parties in both *Riles II* and *PASE*—or socioeconomic explanations. In any event, the court in *Riles II* was correct in criticizing test publishers for not adequately standardizing and validating their instruments on discrete minority populations. The court could only rest its holding on the data presented to it by the parties. The state's defense was made difficult by the lack of relevant studies on differential validity, the absence of systematic research concerning content bias, and California's concession that cultural differences affected IQ scores.

If Judge Peckham's analysis of the issue of cultural bias was scanty and faulty, Judge Grady's can best be described as naive. At worst it was unintelligent, and completely devoid of empirical content. At bottom, what it represented was a single person's subjective and personal judgment cloaked in the apparent authority of judicial robes. If submitted as a study to one of psychology's more respected refereed journals, rather than masquerading as a legal opinion, it would have been summarily rejected as an experiment whose sample size and lack of objectivity stamped it as unworthy of publication. The court's opinion in *PASE* amply supports Reschly's (1980) conclusion, that with regard to item bias on the individually-administered intelligence tests, ''subjective judgments appear to be unreliable and invalid in terms of empirical analysis. . . . The only data confirming test bias that exists now is judgmental and speculative [p. 127].''

What makes Judge Grady's opinion interesting, if not precedent setting, is the fact that the decision contains the questions and correct answers to every question on the WISC, WISC-R, and the Stanford-Binet. McClelland (1973) suggested several years ago that tests should be given away. Whether inadvertently or purposely, Judge Grady has done just that. Those who wish to destroy the usefulness of these tests need only inform parents and antitest advocates of the existence of the decision and its citation to the proper volume in the series of legal reports that publishes verbatim all federal district court opinions. Although Judge Grady eventually upheld the tests as valid, his decision, to a far greater extent than Judge Peckham's decision in *Riles II*, may have the effect of invalidating the tests as they are presently used. The Psychological Corporation, publisher of the Wechsler Scales (and the System of Multi Pluralistic Assessment [SOMPA] which uses these scales), unsuccessfully tried to convince Judge

Grady to seal that part of his decision containing the questions and answers to the scales (Lennon, 1980) so that their content would not be published and thus made public. It has since issued a statement (Udell, 1980) attempting to protect its copyright in the tests and that threatens legal action if it is not protected: "The Psychological Corporation considers unauthorized reproduction of its copyrighted material from any source, including a court's opinion, to be an invasion of its rights, including its copyright, and the right to maintain the necessary security of its tests" (Udell, 1980). As of this writing, there has not been specific legal action against those who have informed general audiences of its existence. But one potential outcome of the decision is that the security of these tests may have, indeed, been seriously compromised, if not destroyed.

These two decisions and their diametrically opposed outcomes once again reveal that the issue of cultural bias is complex and controversial and that opinions concerning its existence are contradictory. Several models of test bias, particularly with regard to its effect on prediction and selection, have been offered (see Peterson and Novick (1976)) none of which seem to have gained favor over others. As Ysseldyke (1978) recently commented: "Several investigators have reviewed the models of test fairness and have concluded that there is little agreement among the several models. It is readily apparent that major measurement experts have been essentially *unable* to agree on a definition of a fair test, let alone identify a test that is fair for members of different groups. There is little agreement on the *concept* of nondiscriminatory assessment [p. 150]."

Definitions of test bias may not only be "widely disparate," stemming "from entirely different universes of discourse (Schmidt & Hunter, 1974, p. 1)" but ethical positions regarding test bias may be "irreconcilable (Hunter & Schmidt, 1976, p. 1069)." Finally, and perhaps most importantly, reliance on psychometric models of test bias without consideration of the social and ethical consequences of test use ignores the concerns of significant segments of society. While the American Psychological Association Ad Hoc Committee Report on the Educational Uses of Tests with Disadvantaged Students (Clearly, et al., 1975) defended the technical adequacy of tests for prediction and selection, it failed to consider what minority groups charge was the egregious misuse of tests having a negative impact on the lives of minorities (Bernal, 1975; Jackson, 1975). As Reschly points out (1978): "to defend tests on the basis of evidence of common regression systems or to attempt to separate the issues of technical adequacy from the social consequences is insufficient [p. 235]." In that light, recent attempts to examine the ethical, legal, and social implications of various models of test bias are valuable additions to the literature (e.g., Hunter & Schmidt, 1976; Messick, 1980; Novick & Ellis, 1977). In essence, even the selection of a model to measure and ameliorate test bias is ultimately a value judgment. If, as some critics charge (e.g., Bersoff, 1973, 1971; McClelland, 1973; Peterson, 1968; Tharp & Wetzel, 1969; Salvia & Ysseldyke, 1978) tests do not accurately reflect

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the genuine functioning of students, regardless of race, class, gender, or ethnicity, they may be relatively useless for the purpose for which they are expressly designed in school systems—the development of individualized and effective educational curricula.

Judicial resolution of all these issues may have to await ultimate review of both these cases by the Supreme Court several years from now. But that Court is supreme only because it is last, not because it is best. One can only wonder how that body will decide the controversy concerning test bias in the mid-1980s.

## CONCLUSION

Fifteen years ago two prescient scholars stated: "It requires no Cassandra to predict lawsuits by parents, and a spate of restrictive legislation, if those who administer . . . tests in schools—even for the most legitimate of scientific purposes—do not show a sensitive appreciation for both individual and group claims to a private personality (Reubhausen & Brim, 1965 [p. 1194])." Their only error was in failing to divine all the causes for the litigation and legislation they so accurately predicted. Although concern for privacy stimulated some suits, it was the perversion of psychological tests as instruments of segregation and discrimination that led to the case and statutory law that this chapter has surveyed. The ineluctable conclusion is that psychological testing—now banned, condemned, and regulated—would have survived with its reputation relatively unscathed had it not been used both intentionally and inadvertently to perpetuate racial separation, stereotyping, and stigmatization.

An often repeated rejoinder to criticisms of psychological testing has been that it is not the instruments but the users who have brought about the current state of affairs. Although such a defense serves to deflect attention from genuine flaws in the tests themselves, there is truth to it. It is the use of tests that courts enjoin, but it is the testers and their employers who are sued. It was the failure of psychologists to question their role, to scrutinize the psychometric soundness of their instruments, and to test the validity of their interpretations, that resulted in misclassification and miseducation and the injuries that flowed therefrom to significant numbers of children of all racial and cultural backgrounds. The consequence has been the imposition of a number of well-meaning but unrealistic and often impossible restrictions of the use of psychological tests.

There are at least three benefits, however, from the increased involvement of courts and legislatures in psychologists' testing practices. First, it has made the profession, as well as society in general, more sensitive to racial and cultural differences and to how apparently innocent and benign practices may perpetuate discrimination. Second, it has alerted psychologists and other mental health professionals to the fact that they will be held responsible for their conduct. Because of the accountability mechanisms now inherent in the procedural protections afforded handicapped children and their parents, psychologists who work in school settings find that they cannot view themselves only as passive recipients of orders from their supervisors. To protect the rights of their clients, to safeguard their own integrity, and, in the long run, to serve the asserted ends of their employers to educate students effectively, they must examine their practices, their interpretations, and their ultimate recommendations. Finally, the attack on psychological testing has accelerated the search for alternative means of assessment so that what is said about children is a more valid, truer depiction of how they perceive themselves and how they function in all spheres of life. In this light, the intense and searching examination that psychological testing has received from the legal system should be viewed as both salutary and welcome.

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